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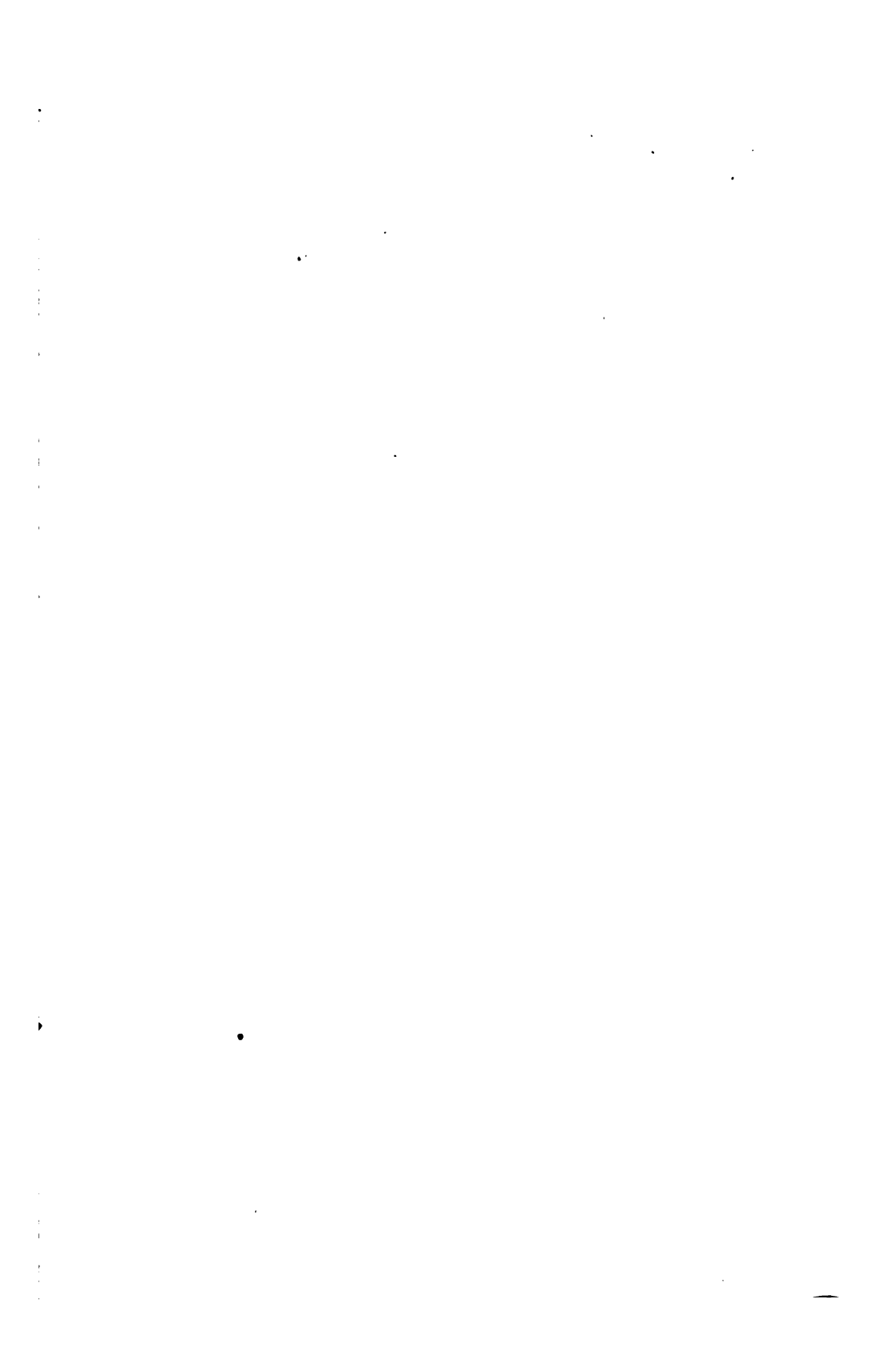
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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

C. P. POMEROY
REPORTER

H. L. GEAR
ASSISTANT REPORTER

VOLUME 18

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1912

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MATTHEW T. ALLEN, Presiding Justice.

W. P. JAMES, Associate Justice.

VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.

ELIJAH C. HART, Associate Justice.

ALBERT G. BURNETT, Associate Justice.

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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Crim. No. 175. Third Appellate District.—January 4, 1912.]

In Re WILLIAM HENLEY on Habeas Corpus.

CRIMINAL LAW — INEBRIETY — AFFIDAVIT FOR ARREST — SUFFICIENCY — HABEAS CORPUS.—An affidavit for arrest, under section 2185c of the Political Code, enacted in 1911 (Stats. 1911, p. 396), which states that the person to be arrested "is so far addicted to the intemperate use of stimulants as to have lost the power of self-control; that by reason thereof said person is a fit subject for commitment to a state hospital for the care and treatment of the insane, and ought to be confined therein as an inebriate, under the provisions of section 2185c of the Political Code," corresponds substantially with the language of the statute, and cannot be held so deficient in showing that he belongs to a class contemplated thereby as to entitle him to be discharged on *habeas corpus*.¹

ID.—LOSS OF SELF-CONTROL.—FACT INFERRED FROM FACTS OBSERVED.—MATTER OF KNOWLEDGE OR OBSERVATION.—The loss of the power of self-control and the intemperate use of stimulants are facts, though the knowledge of them may be the result of inference from other known facts; but they are so intimately connected with the observation of the appearance or conduct of the person as to be properly placed within the category of knowledge or observation, rather than of opinion. They do not require the exercise of judgment so much as the faculty of perception.

ID.—OPINION AS TO "INEBRIETY" DEDUCED FROM FACTS OBSERVED.—ULTIMATE FACT.—EXCEPTION AS TO "MATTER OF OPINION."—If the statement in the affidavit of arrest that the accused is an "inebriate" is to be regarded as the statement of an opinion, it is merely the statement of an ultimate fact, deduced from facts observed as to the habits of the accused as to "intoxication," and

if the conclusion as to the ultimate fact involves matter of opinion, it falls within an exception to the general rule as to "matter of opinion" as thoroughly established as the rule itself.

ID.—RIGHT OF ADMISSION TO BAIL PENDING EXAMINATION—SHOWING OF DANGER TO SAFETY REQUIRED.—Unless there is an affirmative showing of danger to the safety of one or to society in allowing the accused to be admitted to bail, he is entitled, under section 6 of article I of the constitution, to be admitted to bail until a hearing and examination can be had.

PETITION for writ of *habeas corpus* to the sheriff of Sacramento County.

The facts are stated in the opinion of the court.

R. Platnauer, for Petitioner.

J. Q. Brown, Deputy District Attorney, for Sheriff, Respondent.

BURNETT, J.—Petitioner, held on a warrant of arrest by the sheriff of Sacramento county, claims that said warrant was issued without authority of law, and is therefore void. The proceeding against petitioner was instituted under the statute passed by the legislature of 1911 providing for the "arrest, hearing and commitment of inebriates and drug habitues." (Stats. 1911, p. 396.) The affidavit upon which the warrant herein was predicated set forth: "That there is now in the said county in the city or town of Sacramento a person named William Henley who is so far addicted to the intemperate use of stimulants as to have lost the power of self-control. That by reason thereof said person is a fit subject for commitment to a state hospital for the care and treatment of the insane and ought to be confined therein as an inebriate under the provisions of section 2185c of the Political Code of the state of California." Said section, as far as necessary to quote, provides that "Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that a person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service a warrant," etc. It is thus to be seen that the affidavit corresponds substantially with

the language of the statute. It describes the defendant so that he appears as a suitable subject for the operation of this beneficent law. No attack is made upon the validity of the statute itself. The competency of the legislature to enact it is not brought into question, but the contention is made that the magistrate had no jurisdiction to issue the warrant, for the reason that sufficient facts are not alleged in said affidavit from which the magistrate could legally infer that petitioner belongs to a class contemplated by said law. We think, however, it should not be held that said affidavit is so deficient in that respect as to entitle petitioner to be discharged on *habeas corpus*. The affiant expressed more than a mere opinion. The loss of the power of self-control and the intemperate use of stimulants are facts, although, of course, the knowledge of them may be the result of inference from other facts. But these concepts are so intimately connected with the observation of the appearance or of the conduct of a person as to be properly placed within the category of knowledge or observation rather than of opinion. They do not require the exercise of judgment so much as of the faculty of perception. But if we regard the allegations of the affidavit as the expression of an opinion that petitioner is an inebriate, the case falls within the principle of *Holland v. Zollner*, 102 Cal. 633, [36 Pac. 930, 37 Pac. 231]. Therein it is said that, as a general rule, witnesses must state facts and not opinions deduced from the facts, but to this rule there are several exceptions as thoroughly established as the rule itself. One of these exceptions applies to questions "concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, etc. (Note to Wharton on Evidence, sec. 573.) The reason underlying the exception is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it. (*De Witt v. Barly*, 17 N. Y. 340.)" As further stated therein: "Various mental and moral operations find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call opinion." So

here, affiant states what to her is an ultimate fact deducible probably from other facts and partaking somewhat of the nature of an opinion, but being strictly legal evidence of the mental condition of petitioner superinduced by excessive indulgence in stimulants. We can see no reason why this might not, within the meaning of the law, "satisfy" the magistrate that petitioner should be examined as to whether he is subject to said provision. The proceeding, it may be remarked, is simply preliminary to the examination of the charge to be had after the notice prescribed by the statute, and the affidavit sufficiently informs petitioner of the nature of the accusation.

We do not consider in point the cases cited by petitioner as to the publication of summons. Of these, *Ricketson v. Richardson*, 26 Cal. 149, is the pioneer and is typical of the others. Therein it is said that "It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated." The propriety of so holding is apparent, as the consideration of "due diligence," "a good cause of action" and "a necessary party" involves questions of law to be determined by the court after an examination of the facts.

Petitioner also urges that in case the said affidavit is considered sufficient to authorize the magistrate to issue the warrant, then he should be admitted to bail pending the examination of the charge. It appears that bail was denied by said magistrate, but upon what ground does not appear, nor is any reason advanced here for the order except that it is a matter of right under the provision of the constitution of the state that "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." (Art. I, sec. 6.) This is a wise and salutary measure, and the scope of it is sufficiently comprehensive to include a person charged with being an inebriate. His right as to bail should certainly not be more restricted than that of a person accused of a grave crime. In the latter contingency no question would be raised except in the case of a capital offense as provided in the constitution.

There might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail, but unless such a showing is made, the said provision of the constitution should be held, we think, to apply. It is provided in said statute that the officer to whom the warrant of arrest is delivered must "arrest and detain such person until a hearing and examination can be had." This, of course, must be read in connection with said constitutional provision, as no one would contend that the legislative enactment could operate to modify or repeal any portion of the constitution.

It is ordered that petitioner be admitted to bail in the sum of \$250 pending the examination, the bond to be approved by the Honorable J. W. Hughes, judge of the superior court of Sacramento county.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 884. Third Appellate District.—January 8, 1912.]

AARON SIMINOFF, Appellant, v. JAS. H. GOODMAN & CO. BANK, a Corporation, Respondent.

BANKS—DISHONOR OF TRADER'S CHECKS—MEASURE OF DAMAGES—CONSTRUCTION OF CIVIL CODE—DAMAGES PROXIMATELY CAUSED.—A trader, who is a depositor in a bank incorporated under the laws of this state, whose checks have been wrongfully dishonored, is not limited to damages under section 3302 of the Civil Code, to the amount due for breach of contract, "with interest thereon," and which has no further application; but is properly entitled, under section 3300 of that code, to the measure of damages "for the breach of an obligation arising from contract," which is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the nature of things, would be likely to result therefrom," or for a *wrong* under section 3333 of that code, the measure of damages for which is the same, "whether it could have been anticipated or not."

ID.—COMMERCIAL INTEREST INVOLVED IN HONOR OF TRADERS' CHECKS—DISHONOR A GRIEVOUS WRONG.—The whole commercial community

and every interest dependent upon commerce are affected by the honor of traders' checks; and the courts should hold banks to the proper performance of their duty to their trader depositors. The consequences to a trader from the dishonor of his checks is so notorious that no bank can justly affect ignorance of what the whole commercial world is vividly alive to. The dishonor of a trader's check without right is a grievous wrong, since the drawer's credit suffers, and a single wrongful refusal to honor his check might work his ruin as a business man.

ID.—CONSTRUCTION OF CODE IN RELATION TO COMMON LAW.—The Civil Code, establishes the law of this state in so far as it departs from the common law, and where its provisions are in harmony therewith, they are to be interpreted in the light of the common law, and where the code is silent the common law governs.

ID.—COMMON-LAW RULE AS TO DISHONOR OF BANK CHECKS—SUBSTANTIAL DAMAGES—CASE OF TRADER.—At common law substantial damages may be recovered against a banker for dishonoring the check of a depositor when there is sufficient money in the banker's hands at the time to meet the check. Whenever the bank fails to fulfill its agreement with the depositor to honor his check, the depositor, by proving its dishonor, is always entitled to recover substantial damages. In the case of a trader, from the fact of his dishonored check, injury to his credit may be inferred, and substantial damages may be given on proof of that fact.

ID.—EFFECT OF WRONGFUL ACT OF BANK—IMPUTATION OF DISHONESTY—FELONY.—The wrongful act of the bank in refusing to honor a proper check not only imputes insolvency, dishonesty or bad faith to the drawer, and has the effect of slandering him in his business, but, in this state, it being a felony to draw or utter to another person a check on a bank knowing at the time that he has not sufficient funds in his hands to meet such check, its dishonor by falsely indorsing it "no funds" suggests a possible case of felony under the law of this state.

ID.—PLEADING—SPECIAL DAMAGES NOT CLAIMED—SUFFICIENT COMPLAINT—DAMAGES PROXIMATELY CAUSED—SUBSTANTIAL DAMAGES.—Where no special damages are claimed, none need be pleaded. The complaint shows a case for only such damages as may be shown to have been proximately caused by defendant's breach of duty alleged. It is immaterial whether the facts alleged show the breach of an obligation arising from contract under section 3300 of the Civil Code, or from a wrong under section 3333 thereof, since the rule of damage is substantially the same. Substantial damage is the natural and probable consequence of the act; and a substantial recovery may be had therefor without pleading or proof of special injury. If the depositor is a merchant or trader, substantial damage will be presumed from dishonor, without further proof.

Id.—CODE PLEADING—FORM OF ACTION IMMATERIAL.—Under our system of code pleading, the form of the action is immaterial. The pleader may make a plain statement of the facts, and may recover as damages on the facts stated whatever the law will allow, whether arising from contract or from tort.

APPEAL from a judgment of the Superior Court of Napa County, and from an order denying a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

J. J. Dunne, and Chas. E. Trower, for Appellant.

Frank L. Coombs, and Nathan F. Coombs, for Respondent.

CHIPMAN, P. J.—The question presented in this case is whether the complaint states a cause of action. The complaint was filed on September 27, 1909, and sets forth six causes of action. In the first cause of action, it alleges that the defendant was and is a banking corporation organized under the laws of this state, and conducting a general banking business and acting as a banking corporation, with its principal office and place of business located in the city of Napa in Napa county. It is next alleged that, at all the times involved, the plaintiff was a trader in good financial standing and credit, and engaged in the business of manufacturing, selling and dealing in ladies' cloaks and suits in said city of Napa; and that he was a customer of and depositor with the defendant, and had and kept a banking account with defendant, subject to his, said plaintiff's, checks. It is then alleged that, from June 16 to June 19, 1909, plaintiff had in defendant bank a balance due and owing him exceeding the sum of \$21.05, subject to plaintiff's checks; that, on June 16, 1909, plaintiff drew his check number 627 on defendant bank, for \$21.05, payable to the order of Meyer Cloak Company, in payment for an indebtedness then owing by plaintiff to said Meyer Cloak Company, and delivered said check to said Meyer Cloak Company in payment for said indebtedness; that said Meyer Cloak Company, immediately upon receipt of the check, caused it to be presented to defendant bank for payment, properly indorsed, during business hours, and in the

usual course of business; but that defendant bank, notwithstanding that it then had sufficient funds belonging to plaintiff on deposit with it wherewith to honor said check, refused to pay said check, and marked the same "no funds," and returned the check to Meyer Cloak Company dishonored. It is then alleged that, by reason of the foregoing acts and conduct of defendant bank, plaintiff has suffered and sustained damage in the sum of \$75,000, in this, that is to say, by reason of the foregoing acts and conduct of defendant bank, plaintiff has suffered great injury in his name and credit with said Meyer Cloak Company and others, and his standing as a reputable merchant has been lost, and his credit destroyed.

The remaining five causes of action are based on similar facts as to five other checks, drawn in favor of different firms, in sums varying from \$3.75 to \$287.45, all of which were returned to the payees dishonored. Four of these checks were drawn on June 12, 1909, and two of them on June 16, 1909, and all shared the same fate, although defendant, as is alleged, had funds in its hands to the credit of plaintiff sufficient to meet the same.

The question of importance to be determined is whether section 3302 of the Civil Code prescribes the only measure of damages in cases of this character, or, in fact, was intended to apply to such cases at all. It reads: "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." This section is found, among others, in chapter II, article I of part II, and is designated by its subhead, or what may be termed its syllabus, to pertain to cases for "breach of contract to pay liquidated sum." Section 3300 of the same code and part of the same article provides: "For the breach of an obligation *arising* from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Article II of the same part, in general, relates to "damages for wrongs." Section 3333 is as follows: "For the breach of an obligation *not* arising from contract, the measure of damages, except where otherwise provided by this code, is the

amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The same code defines an obligation to be "a legal duty, by which a person is bound to do or not to do a certain thing" (Civ. Code, sec. 1427); and may arise "either from the contract of the parties, or by operation of law," in which latter case it "may be enforced in the manner provided by law, or by civil action or proceedings." (Id., sec. 1428.) It will be observed that the code furnishes a different measure of damages for breaches of obligations "to pay money only" and breaches of obligations *arising* from contracts generally, and from obligations not arising from contract, i. e., from wrongs.

The position taken by respondent is that "section 3302 controls the measure of damages to the exclusion of every other section of the code, and to the exclusion of every other principle of law," and this results, as is claimed, from "the relation of debtor and creditor existing between the depositor and the bank." Furthermore, "that there is no other obligation, the breach of which is alleged, and no other is anticipated by the contract; that if there is an element of tort about the act of refusal to pay for which a different rule may apply as to the measure of damages, the nature and character of the circumstances must be alleged and shown, and special damages pleaded."

Appellant contends, as does respondent, that the cause of action rests upon the duty of the bank toward its depositors, but it is claimed by appellant that this duty is not alone that of debtor and creditor, but "that upon the proper presentation of a proper check by a proper person, there being sufficient funds on deposit to the credit of the drawer of the check, it is the duty of the bank promptly to honor the check, subject, of course, as Mr. Morse points out (2 Banks and Banking, sec. 445), to the right of the bank to take a reasonable time to make inquiries in cases in which suspicious circumstances appear. . . . That the whole commercial community, and every interest dependent upon commerce, are affected by the honor of traders' checks," and that "the courts should hold banks to the proper performance of their duties to their trader depositors." It is further contended by appellant that, whether the alleged cause of action be treated as upon con-

tract or in tort is, in this state, immaterial upon the question of damages; because we have but a single form of action, in which nothing more is necessary than to state the facts and pray for the appropriate relief; "that in actions for damages for breach of contract, the parties need not to have consciously anticipated the precise damages which would flow from the breach, but, as our supreme court points out (*Hunt Bros. Co. v. San Lorenzo Co.*, 150 Cal. 51, 56, 57, [7 L. R. A., N. S., 913, 87 Pac. 1093]), will be taken to have contemplated all damages which they ought, as reasonable persons exercising their faculties with reasonable prudence and discretion, to have contemplated; because no one can escape liability by the simple expedient of closing his eyes to what he would have seen if he had but looked; and because the consequences to a trader from the dishonor of his checks is so notorious that no bank can justly affect ignorance of what the whole commercial world is vividly alive to; . . . that the obligation to pay a trader's check involves something more than the mere discharge of a debt—involves something more in its aims and consequences than a mere 'obligation to pay money only'; and that section 3302 cannot furnish a just measure of the damages suffered by a trader through the dishonor of his checks."

An examination of section 3302, when considered in its relation to other sections of the same title, and when construed as we are told by section 1858 of the Code of Civil Procedure it must be construed (i. e., that "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein"), will show that the section deals only and solely with contractual relations, and is intended to define the detriment caused by some breach of a contract to pay a liquidated amount. It does not attempt to provide a measure of damages in the large number of cases where the cause of action is "for the breach of an obligation arising from contract" (Civ. Code, sec. 3300); or "for the breach of an obligation *not* arising from contract" (sec. 3333), i. e., for torts or wrongs or breaches of obligations arising by operation of law, or implied obligations. And it is not to be forgotten that, although the code establishes the law of this state respecting the subjects to which it relates, it "does not mean that there is no law with respect to such subjects except

that embodied in the code. . . . Where the code is silent, the common law governs." (*Estate of Apple*, 66 Cal. 432, 434, [6 Pac. 7]; *Peters v. Peters*, 156 Cal. 32, 34, [23 L. R. A., N. S., 699, 103 Pac. 219]; Pol. Code, sec. 4468.)

In an illuminating article by Professor Pomeroy, published in volumes 3 and 4 of the West Coast Reporter, reprinted in an appendix to appellant's reply brief, that distinguished author says: "Except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter, or abrogate the common-law rule concerning the subject matter, the courts should avowedly adopt and follow without deviation the uniform principles of interpreting all the definitions, statements of doctrines, and rules contained in the code in complete conformity with the common-law definitions, doctrines, and rules, and as to all subordinate effects resulting from such interpretation." This view is urged because of the "peculiar excellencies, acknowledged by all able jurists to belong to" the common law; because "the Civil Code, as a matter of fact, was not designed to make any general alterations in the established doctrines and rules of the common law"; and because "the Civil Code does not embody the whole law concerning private and civil relations, rights, and duties; it is incomplete, imperfect and partial."

It seems to be conceded by respondent, which is undoubtedly true, that, at common law, substantial damages may be recovered against a banker for dishonoring the check of a depositor, there being sufficient money in his hands at the time to meet it. The rule prevailing in this country, in states where the question has arisen, is given in volume 5, *American and English Encyclopedia of Law*, second edition, pages 1059, 1060, as follows: "The relation between the bank and the depositor is that of debtor and creditor. The bank, in consideration of the deposit or loan, impliedly agrees with the depositor that whenever a demand is made by the presentation of a genuine check in the hands of a person entitled to receive the amount, the check will be honored to the amount of funds on deposit. And whenever the bank fails to fulfill this agreement with the depositor, by a failure to honor the check when duly presented, a right of action at once accrues. The depositor, by proving such loss, is always entitled to recover

substantial damages. But, if unable to show any such loss or injury, the better opinion seems to be that he would still be entitled to recover such moderate damages as the jury should judge to be a fair and reasonable compensation for the injury which he must have sustained; for it is almost impossible for a check to be dishonored without reflecting upon the character and credit of the drawer, the extent of the injury being within the peculiar province of the jury to determine."

Mr. Morse says: "The duty of the bank to make such payments (i. e., payment of checks on presentation, the bank having sufficient funds of the drawer), and the reciprocal right of the depositor to have them made, arise from the contract to that effect which, though probably never definitely expressed, will always be considered to be implied from the usual course of the banking business. This duty and this right are so far substantial, that, if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank." (2 Morse on Banks and Banking, 4th ed., sec. 458.) The supreme court of this state, in *Janin v. London & S. F. Bank*, 92 Cal. 14, 22, 23, [27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100], said: "It is well settled that a bank, in receiving ordinary deposits, becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it." This implied obligation or duty out of which arises an action for nonperformance, is that payment will be made on presentation and is an obligation different from and in addition to that existing ordinarily between debtor and creditor. "These dealings in bank checks stand upon peculiar grounds. The exigencies of trade do not admit of the delays attending the process of acceptance, or arising from the efflux of days of grace. If the drafts are delayed; if the bank, being in funds, be at liberty to refuse payment—the inevitable consequence to the parties disappointed can be none other than such as the want of scrupulous punctuality always inflicts. The drawer's credit suffers; and it is well known that for this injury a depositor is entitled to his action against the bank." (*Fogarties v. State Bank*, 12 Rich. (S. C.) 518, [78 Am. Dec. 468].) A single refusal to honor a check might work

the ruin of a business man. That the returning of a check by a bank to the payee, indorsed "no funds," would necessarily tend to injure the credit and business standing of the drawer of the check is a proposition so obvious as to need no argument to establish its truth. "It is almost impossible for a check to be dishonored without reflecting upon the character and credit of the drawer, the extent of the injury being within the peculiar province of the jury to determine." (5 Am. & Eng. Ency. of Law, 2d ed., 1060; 2 Morse on Banks and Banking, sec. 458.) And it is equally obvious that the rule contended for by respondent would furnish no adequate measure of the damage suffered in such a case. (1 Sutherland on Damages, 3d ed., sec. 77.) In a Pennsylvania case, where the ruling of the trial court was held to be correct, in refusing to charge the jury "that the mere loss of credit by the plaintiff is not a ground for damages, unless it be immediately connected with some tangible pecuniary loss of which it was the cause," the court said: "A bank is an institution of *quasi*-public character. It is chartered by the government for the purpose, *inter alia*, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositor's checks upon demand. Individual and corporate business could hardly exist for a day without banking facilities. At the same time, the business of the community would be at the mercy of banks if they could at their pleasure refuse to honor their depositors' checks and then claim that such action was the mere breach of an ordinary contract for which only nominal damages could be recovered unless special damages were proven. There is something more than a breach of contract in such cases." (*Patterson v. Marine National Bank*, 130 Pa. 419, [17 Am. St. Rep. 778, 18 Atl. 632, 633].)

In this state it is a felony for a person to willfully, with intent to defraud, make or draw or utter to another person a check on a bank, knowing at the time that he has not sufficient funds in such bank to meet such check. (Pen. Code, sec. 476a.) In *Svendson v. State Bank*, 64 Minn. 46, [58 Am. St. Rep. 522, 31 L. R. A. 552, 65 N. W. 1086], the supreme court placed the rule "on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check

and has the effect of slandering him in his business," and it was there held that the position "that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities." When, in this state, a bank returns to the payee a check with the indorsement "no funds," the act at once suggests not only what the Minnesota court says it imports, but it suggests a possible violation of a penal statute punishable as a felony. And yet, as respondent contends, the only redress is in an action in assumpsit for money had and received, with interest. The Massachusetts court said: "In the case of a trader, injury to his credit may be inferred from the fact he is a trader, and substantial damages may be found and given, on proof of that fact, without anything more." (*Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, [67 N. E. 655].)

When our Civil Code says that "for every wrong there is a remedy" (section 3523), it means a remedy in some degree commensurate with the injury inflicted. The books abound in decisions holding that the dishonor of a trader's check is a grievous wrong. Lame and impotent, indeed, must be that system of remedies that furnishes no adequate relief in such cases. We cannot bring ourselves to believe that section 3302 of the Civil Code was intended to take away a right of action universally conceded to exist elsewhere. No reason can be suggested why banks in this state should enjoy such immunity. It is no sufficient answer to the cases cited, and numerous others to like effect, that in those jurisdictions no statutory rule of damages, as we have in section 3302, is enacted. That the rule is firmly established, though not by legislation, in the states alluded to, by judicial decisions coming down to us from the common law cannot be questioned, and it has never been held to take away the right of action contended for by appellant. The rule, prescribed by our code as a measure of damages, has been elsewhere held to apply solely to the limited class of cases referred to therein, namely, for breaches of obligations to pay money only, i. e., liquidated demands. Before we should feel authorized to hold that the rule laid down in section 3302 was intended to furnish the only measure of damage in such a case as we have

here, it should be made to appear clearly from the terms of the statute that such was its intention, which we do not think does so appear. (Mr. Pomeroy's article, *supra*.)

Whether the facts alleged bring the case within section 3300, Civil Code, as a breach of an obligation arising from contract, or within section 3333, Civil Code, for a wrong, i. e., a breach of an obligation not arising from contract, is not very material. The measure of damage is substantially the same in both cases. In a sense, here the injury arises from contract, and in a sense it is independent of contract and sounds in tort. But, viewed in either sense, section 3302 has no application to the facts alleged.

It has been sufficiently shown, contrary to respondent's contention, that the relation between a trader depositor and a bank is something more than that of debtor and creditor. The complaint alleges the breach of an obligation beyond that arising from the simple relation of debtor and creditor—an obligation implied by the peculiar circumstances surrounding the parties in that relation, and an obligation which, in the nature of these circumstances, must have been anticipated by the parties. So far as the element of tort is involved in the conduct of the defendant, we do not think, as is claimed by defendant, that "the nature and character of the circumstances must be alleged and shown and special damages pleaded," in order to maintain the action. Special damages are not claimed. Only such damages as might be shown to have been proximately caused by defendant's breach of duty are claimed. (Civ. Code, secs. 1427, 1428.) The averments of the complaint are sufficient to show the violation of defendant's obligation, for which the law authorizes substantial damages. Actual compensation to the injured party, whether caused by tort or breach of contract, is the first object of the law. "Every invasion of a legal right is presumed in law to cause an injury, and, though none is shown, there may nevertheless be a recovery of nominal damages with costs of the action. Such recovery is a judicial recognition of the right and an admonition that it cannot be invaded with impunity. The relation between banker and depositor is one of contract. The right of the latter is that, to the extent of his credit balance subject thereto, his checks drawn and presented according to the customs and usages of the business, shall be

promptly honored. For a breach of this right an action for damages will lie. If the depositor is a merchant or trader, it will be presumed, without further proof, that substantial damages have been sustained. This rule proceeds upon the fact commonly recognized that the credit of a person engaged in such a calling is essential to the prosperity of his business, and the dishonoring of his checks is plainly calculated to impair it and to inflict a most serious injury. In common opinion, substantial damage is the natural and probable consequence of the act, and therefore a substantial recovery may be had, without pleading or proof of special injury." (*Third National Bank v. Ober*, 178 Fed. 678, [102 C. C. A. 178]. See authorities in note, 5 Cyc. 535.) In *Heister v. Loomis*, 46 Mich. 6, [10 N. W. 60], Mr. Justice Cooley points out a distinction sometimes drawn in awarding damages where breaches of contract are involved and in cases of tort. In the former the damage allowed is because of something which could have been foreseen and reasonably expected; in the latter "the plaintiff does not assist in making the case; it is made for him against his will." The learned jurist then says: "To deny the injured party the right to recover any actual damages in such cases because they are of a nature which cannot be certainly measured, would be to enable parties to profit by and speculate upon their own wrongs, encourage violence, and invite depredation." He adds that "Where the damages are such as do not follow the injury as a necessary consequence, they should be specially alleged in the declaration." But all the authorities agree that more or less injury necessarily follows the dishonor of a trader's check. Besides, Judge Cooley is speaking of actions generally and not particularly of the dishonor of a trader's check. In his work on Torts, the author says: "The refusal of a bank to pay the plaintiff's check to a third party, though having sufficient funds of the plaintiff to meet it, is in the nature of a slander upon the plaintiff's credit and business, and renders the bank liable for substantial damages, though no actual damages are proven, *when the plaintiff is engaged in trade or business.*" (1 Cooley on Torts, 3d ed., p. 396.) Among the cases cited in the note and in the text is *Schaffner v. Ehrman*, 139 Ill. 109, reported, also, in 32 Am. St. Rep. 192, 28 N. E. 917, and 15 L. R. A. 134, which last has a note on

the question. The opinion in that case was on petition for rehearing and is a careful review of the English and American cases. It was there held that the bank was liable for more than nominal damages, without any proof of actual loss or damage, although the refusal to pay the check was the result of a clerk's mistake. Craig, J., dissented, holding that, under the circumstances appearing at the trial, only nominal damages were recoverable. No dissenting voice is found to go beyond this, and even in that view the complaint here is sufficient. Judge Cooley quotes from the opinion, where it is said: "It is well understood that an action for slander by a person for the speaking of slanderous words of him in the way of his trade, the fact that he is a trader, takes the place of special damages. To return a check marked 'refused for no funds' to the holder, especially through a clearing-house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business, and it needs no argument to show that a single refusal might often, and frequently does, bring ruin upon a business man; and yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specially in what manner he has been injured." It was said in *Arzaga v. Villalba*, 85 Cal. 111, [24 Pac. 656], "Every action is now, in effect, a special action on the case. . . . Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum*, trespass *vi et armis*, or any other technical form of action, *ex delicto* or *ex contractu*. . . . Under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be." In harmony with this view, universally taken where the reformed procedure is adopted, the supreme court of Iowa said: "The pleader simply makes a plain statement of the facts, avoiding legal conclusions, and may recover as damages, on the facts stated, whatever the law will allow, either for breach of contract or for the tort pleaded." (*Mentzer v. Western Union Tel. Co.*, 93 Iowa, 752, [57 Am. St. Rep. 294, 28 L. R. A. 72, 62 N. W. 1].) And so it was held,

in *Lorick v. Palmetto Bank & T. Co.*, 74 S. C. 185, [7 Ann. Cas. 818, 54 S. E. 206]: "The liability of a bank to its depositor for substantial damages, temperate in amount, for refusing to pay his check, not exceeding his credit, is generally if not universally recognized. And it is not necessary to recovery that there should be proof of special damages, the law presuming that the result is injury to the credit of the depositor from the general experience of men in such transactions." The cases are extensively considered in the opinion.

In the case here it seems plain that the cause of action grew out of or arose from contract, in the sense that it never would have arisen but for the original contractual relation; still there is in it an element of tort or wrong—a violation of duty; and we have seen that damages are allowable in whatever view the case may be regarded; hence we think the form of the action is immaterial. The case is analogous to the frequently occurring cases arising in breaches of contract for the transportation of passengers by railroad where the damages are recoverable for the wrongful acts of the defendant committed in violation of its contract.

The supreme court, in *Capital Gas Co. v. Young*, 109 Cal. 140, [29 L. R. A. 463, 41 Pac. 869], said: "The duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law, and hence the laws governing ordinary contracts resting in the volition of the parties thereto have no application." If it be said that that was the case of a public service corporation and hence the reason underlying the rule there laid down does not apply here, it may be answered by the opinion in *Meadowcroft v. People*, 163 Ill. 56, [54 Am. St. Rep. 447, 35 L. R. A. 176, 45 N. E. 991]: "The fundamental error in the contention thus formulated is the assumption that the business of banking stands upon exactly the same footing that the ordinary industrial pursuits of farming, merchandising, manufacturing and mining, and the many other common occupations of life, stand upon. The business of a banker is not *juris privati* only, but, like that of an innkeeper or common carrier, is affected with a public interest, and therefore subject to public regulation." (*Fogarties v. State Bank*, 12 Rich. (S. C.) 518, [78 Am. Dec. 468].) Said the Pennsylvania court: "A bank is an institution of quasi-public character." (*Patterson*

v. *Marine National Bank*, 130 Pa. 419, [17 Am. St. Rep. 778, 18 Atl. 632]; *Ex parte Pittman*, 31 Nev. 43, [20 Ann. Cas. 1319, 22 L. R. A., N. S., 266, 99 Pac. 700]; *State v. Rich-creek*, 167 Ind. 217, [119 Am. St. Rep. 491, 10 Ann. Cas. 899, 5 L. R. A., N. S., 874, 77 N. E. 1085].) It is upon the assumption that banking institutions are affected with a public interest that they are subject to regulation.

Without pursuing the argument further, our conclusion is that section 3302 of the Civil Code does not apply to a case of this character; that the complaint states a cause of action, and that the court erred in holding otherwise and in refusing to allow plaintiff to submit evidence in its support.

The judgment and order are reversed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 8, 1912.

[Civ. No. 969. First Appellate District.—January 10, 1912.]

DORIS BRADFORD, by RUTH BRADFORD, a Feme Sole, Her Guardian ad Litem, Petitioner, Appellant, v. THE BOARD OF EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO, T. H. BANNERMAN, MARY KINCAID, HENRY PAYOT, and RICHARD WHEELAN, Respondents.

PUBLIC SCHOOLS — ACT FORBIDDING SECRET FRATERNITIES — POWER OF BOARD TO EXPEL SCHOLAR — POLICY OF LAW — CONSTITUTIONALITY. — Under the act of 1909 (Stats. 1909, p. 332), to prevent the formation and prohibit the existence of secret fraternities in any elementary or secondary school in this state, and requiring boards of school trustees and boards of education to enforce the act, with power to expel any scholar who violates the law, upon appeal from a judgment refusing to reinstate an expelled scholar who has violated the act, the policy of the legislature in enacting it cannot be considered; but the only question to be determined is whether or

not the legislature, in passing it, acted within the limits imposed upon it by the constitution.

ID.—PROVISIONS OF CONSTITUTION NOT VIOLATED—SPECIAL IMMUNITIES—LOCAL OR SPECIAL LAWS.—The act of 1909 does not violate or contravene the provisions of section 21 of article I of the constitution that no citizen or class of citizens shall be granted privileges or immunities which upon the same terms are not granted to all citizens, because immunity is granted to normal schools, and special immunity to all pupils who join certain specified fraternities not connected with the public schools. Nor is such act local or special legislation in violation of section 25 of article IV, forbidding the legislature to pass local or special laws "granting to any corporation, association or individual any special or exclusive right, privilege or immunity."

ID.—GENERAL LAW—ACT APPLYING UNIFORMLY TO PERSONS OF A PARTICULAR CLASS.—An act applying uniformly to all citizens or persons of a particular class is a general law, and not special or local, either in violation of section 21 of article I or of section 25 of article IV of the constitution, if such particular class is founded upon some natural, intrinsic, or constitutional distinction differentiating its members from the general body from which the class is selected. It is held that the younger and more immature pupils of the public schools may quite properly form a particular class, in distinction from normal schools or colleges, and that the act applies equally to all of such particular class.

ID.—QUESTION FOR LEGISLATURE—PRESUMPTION—PROVINCE OF COURTS. The question whether the individuals affected by a law do intrinsically constitute a particular class is primarily one for the legislative department of the state, and when such legislative classification is attacked in the courts, every presumption is in favor of the legislative act; and if sufficient reasons may be assumed therefor, the act will be upheld; and to warrant a court in adjudging it void, as special legislation, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference or making a discrimination.

ID.—EXCEPTION ALLOWING PUPILS TO JOIN OUTSIDE FRATERNAL ORGANIZATIONS NOT AN INVALID DISCRIMINATION.—The exception in the statute allowing pupils in the public schools to become members of such outside associations, not connected with the public schools, as the Native Sons of the Golden West, Native Daughters of the Golden West, or other kindred outside organizations, is not an invalid discrimination, since no such deleterious effects could follow such membership as in the case of secret fraternities or sororities existing wholly among the pupils as forbidden by law.

ID.—TITLE OF ACT—PROHIBITION OF "SECRET OATH-BOUND FRATERNITIES."—The title of the act as "An act to prohibit the formation and existence of secret oath-bound fraternities in the public schools"

is not rendered invalid under section 24 of article IV of the constitution, because the words "sororities or clubs," used in the body of the act, are not expressed in its title. The word "fraternities" used in the title, in its popular sense, includes organizations of both sexes, and expresses "sororities or clubs," and the body of the act is not broader than its title.

ID.—ACT NOT VIOLATIVE OF FEDERAL CONSTITUTION.—The act of 1909 does not violate that provision of the federal constitution which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." That constitutional provision does not include rights and privileges granted to citizens which depend solely upon the law of a state.

ID.—SYSTEM OF PUBLIC SCHOOLS A STATE INSTITUTION, NOT WITHIN FEDERAL GUARANTY.—The system of public schools of this state is a state institution, and is subject to the exclusive control of the constitutional authorities of the state, and the right of attending a public school, though capable of enforcement at law, if wrongfully infringed, is not such a right as is guaranteed by such provision of the federal constitution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Weinmann, Wood & Cunha, and L. R. Weinmann, for Appellant.

Percy V. Long, City Attorney, and John F. English, Assistant City Attorney, for Respondents.

KERRIGAN, J.—This is an appeal from an order and judgment, denying the petitioner a writ of mandate to compel the respondents, the board of education of the city and county of San Francisco and the members thereof, to admit petitioner as a pupil to the Girls' High School of San Francisco, said board having theretofore suspended her for the reason that, while enrolled as a pupil in said school, she joined and became a member of a secret, oath-bound Greek letter sorority existing in said school in violation of a recent act of the legislature.

In the year 1909 there was enacted in this state the following statute:

"An Act to prevent the formation and prohibit the existence of secret, oath-bound fraternities in the Public Schools.

"The People of the State of California, represented in Senate and Assembly, do enact as follows:

"Section 1. From and after the passage of this Act, it shall be unlawful for any pupil, enrolled as such in any elementary or secondary school of this State, to join or become a member of any secret fraternity, sorority or club, wholly or partly formed from the membership of pupils attending such public schools, or to take part in the organization or formation of any such fraternity, sorority or secret club; provided that nothing in this section shall be construed to prevent anyone subject to the provisions of the section from joining the order of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America, or other kindred organizations not directly associated with the public schools of the state.

"Section 2. Boards of School Trustees and Boards of Education shall have full power and authority to enforce the provisions of this act and to make and enforce all rules and regulations needful for the government and discipline of the schools under their charge. They are hereby required to enforce the provisions of this act by suspending, or, if necessary, expelling a pupil in any elementary or secondary school who refuses or neglects to obey any or all such rules or regulations." (Stats. 1909, p. 332.)

Following the enactment of this statute the board of education of the city and county of San Francisco promulgated certain rules and regulations and passed resolutions having for their object the enforcement of this act.

It appears from the respondents' answer (the allegations of which are admitted to be true by petitioner's demurrer thereto and by a subsequent stipulation of the parties), "That subsequent to the adoption of the aforesaid act of the legislature Doris Bradford, petitioner herein, was a pupil enrolled as such in the Girls' High School, a secondary school in the state of California; and that subsequent to the said adoption of the said act of the legislature and while such an enrolled pupil said Doris Bradford joined and became a member of a secret, oath-bound Greek letter sorority existing in said Girls' High School and known as Omega Nu (Gamma Beta Chapter),

partly formed from the membership of pupils attending the said Girls' High School; that said Omega Nu Sorority was at the time said Doris Bradford became a member of the said Omega Nu Sorority, ever since has been and now is directly associated with the public schools of the state of California, and that Doris Bradford ever since so joining said sorority has been and still is a member of said Omega Nu Sorority."

The said answer also set up the facts as to the adoption of said rules by said board after the passage of said act, and the adoption by said board of a resolution suspending said petitioner as a member of said school.

To this answer the petitioner demurred, and a hearing was had upon this demurrer. The demurrer being overruled and the foregoing facts being stipulated by the parties, the court gave judgment dismissing the petition and denying petitioner all relief. The appeal is from said judgment.

Before proceeding to a discussion of the case a brief reference to the growth and effect of secret societies in the public schools of this country may not be wholly superfluous.

The first Greek letter society in a secondary school was Alpha Phi, a literary society, which became a part of a fraternity in 1876. Subsequently secret societies, patterned after college and university fraternities, sprang into existence in the high schools all over the country, until now they have "become so numerous," says a writer on the subject, "as to make it necessary to manipulate the Greek alphabet in an artful way in order to make the necessary distinctions." In time many educators came to believe that whatever good might be claimed for college fraternities was not shared by secret fraternities organized among boys and girls attending the preparatory schools whose characters are yet unformed. It has been said of such societies that they tend to engender an undemocratic spirit of caste, to promote cliques and to foster a contempt for school authority. Doubtless these organizations have many redeeming features, and, we may say, the standard of excellence of some of them is such that they are not opposed by school authorities. (Report of Commission of Education, Annual Reports, 1907, of Interior Department, vol. 1, pp. 437, 441; Encyclopedia Britannica, 11th ed., vol. XI, p. 40.) Nevertheless, in order to curb what is said to be their evil effects in secondary schools, rules and regu-

lations have recently been adopted by boards of education in many of the cities of the country; laws have also been enacted in Ohio, Indiana, Minnesota, Kansas and other states, either absolutely forbidding them or placing them under control. Cases arising under these laws and local regulations have come before the courts of those states, and such courts have uniformly held valid reasonable rules adopted by school authorities to prevent the establishment and development of these secret societies in preparatory schools. (*Wayland v. Board of School Directors*, 43 Wash. 441, [7 L. R. A., N. S., 352, 86 Pac. 642]; *Wilson v. Board of Education*, 233 Ill. 464, [13 Ann. Cas. 330, 15 L. R. A., N. S., 1136, 84 N. E. 697]; *Favorite v. Board of Education*, 235 Ill. 314, [85 N. E. 402]; *People v. Wheaton College*, 40 Ill. 186.)

Coming, now, to a consideration of the case at bar, it is the contention of appellant that the statute in question is void in that it contravenes several provisions of our constitution. Much is said in the interesting and instructive briefs of counsel about the policy of the legislature in enacting laws of this character. With that, however, this court has no concern. We are simply required to decide whether or not, in passing the law in question, the legislature acted within the limits imposed upon it by the constitution. As was said in the case of *Wilson v. Board of Education*, 137 Ill. App. 192, where this very question of secret fraternities among school pupils was being considered: "There may be a contrariety of opinion as to whether secret societies in schools among pupils are beneficial or harmful to either the pupil or the cause of education. In such condition, who shall decide whether the pupils should be encouraged or not in making affiliation with any of them—the courts or the board? It makes no difference which of them shall control so far as affecting the ultimate conclusion is concerned, for the courts have been quite outspoken in their condemnation of such societies in schools as hurtful to the pupil and detrimental to his educational progress. Even if it were otherwise, if the rule is reasonable and equal in its operation, the courts cannot impose their judgment or opinion contrary or in opposition to that of the board, which, in the promulgation of such rules, acts judicially."

In support of her contention that the act is void, appellant first claims that it contravenes section 21 of article I of the constitution, providing, "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens"; and also that part of section 25 of article IV providing that the legislature shall not pass local or special laws, "granting to any corporation, association or individual any special or exclusive right, privilege or immunity."

It is argued by counsel that this contravention of constitutional provisions arises because the act grants an *immunity* to certain pupils in the public schools of the state, viz., those in the normal schools, in that only the elementary and secondary schools come within the provisions of the act; that it grants a special privilege to such pupils by allowing them to join fraternities, sororities and secret clubs while other students in the public schools are punished for doing the same thing; that it grants a privilege and immunity to certain fraternities, viz., the order of the Native Sons of the Golden West, the Native Daughters of the Golden West, the Foresters of America, and other kindred organizations not directly associated with the public schools, because pupils in said schools may join such societies and not come within the inhibition of the act.

The question of the construction and application of said section 21 of article I has come before the supreme court of this state in many cases, and among them quite recently in the case of *Wheeler v. Herbert*, 152 Cal. 233, [92 Pac. 357], where that court said (speaking through Mr. Justice Shaw): "A law applying uniformly to all citizens of a particular class does not violate this section (Const., art. I, sec. 21), if the class is one founded upon some natural, intrinsic or constitutional distinction differentiating its members from the general body from which the class is selected." (Citing California cases.)

Again, in *Ex parte King*, 157 Cal., at page 164, [106 Pac. 579], the supreme court had the same question before it, and said: "... a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. ... If the individuals to whom the legislation is applicable

constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation. . . . The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that when such a legislative classification is attacked in the courts, every presumption is in favor of the legislative act. When upon the facts legitimately before a court it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the legislature in creating that class, though such reasons may not clearly appear from a mere reading of the law, such assumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination."

Applying this construction to the act under consideration, it is quite apparent to us that the younger and more immature pupils of the public schools may quite properly form a class and be made the subject of this character of legislation. Normal schools and colleges are attended by students who are preparing for the serious affairs of life; and being older in years and with wider experience are better fortified to withstand any possible hurtful influence attendant upon membership in secret societies and clubs than the younger pupils attending elementary and secondary schools, who are less experienced and more impressionable.

We have no doubt that there is a sufficient difference between these last-mentioned schools and the normal to constitute a proper basis for classification, and that the statute applies equally to all of the particular class mentioned.

Neither does the exception in the statute of the order of the Native Sons of the Golden West and similar fraternal societies constitute, in our opinion, an invalid discrimination. The act itself requires that they be not "directly associated with the public schools of the state." It is clear that the legislature intended to discountenance only secret societies

in the elementary and secondary schools which are formed almost entirely of the pupils of such schools, and which, in the opinion of the legislature, were calculated to diminish the efficiency of the educational system of the state and exert a harmful influence upon the younger pupils of its schools as such. No such deleterious effect has been or could be attributed to the occasional membership of such pupils in the fraternal orders excepted in the statute, and such exception, therefore, cannot be said to be arbitrary or invalid.

We hold, therefore, that the act is general in its character and not special, and does not contravene the provisions of the constitution referred to.

The next ground of attack urged by appellant is that the act does not conform to that portion of section 24 of article IV of the constitution which provides that "Every act shall embrace but one subject, which shall be expressed in its title."

It will be observed that the title of the act states that it is an act to prohibit the formation and existence of "secret, oath-bound fraternities in the public schools," while the body of the act forbids the formation and existence of "secret fraternities, sororities or clubs." Basing her argument upon this difference of language, it is the contention of appellant that the act is broader in its scope than the title, for the reasons, first, that the expression "secret fraternities" is broader than "secret, oath-bound fraternities," and, second, that the title mentions only fraternities, whereas the body of the act deals also with sororities and clubs.

In order that a fraternity may be secret, a promise or an agreement must be made by its members not to reveal its proceedings or secret work, and as to various other matters, which undertaking is doubtless invariably in the form of a pledge, an obligation, or of a nonjudicial oath. As here used, the compound word "oath-bound" is synonymous with the word "secret." We have no doubt that this is the sense in which the term was employed by the legislature. Dictionary definitions warrant this interpretation of the language, and judicial authority for the same may be found. In the case of *State v. Guy*, 59 Minn. 6, [50 Am. St. Rep. 389, 60 N. W. 676], it is said that an oath "in its broadest sense includes any form of attestation by which a party signifies that he is bound in conscience to perform an act faithfully

and truthfully." (See, also, *Commonwealth v. Jarboe*, 89 Ky. 143, [12 S. W. 138].)

We think also that the word "fraternities" in its popular sense and as here used includes organizations of both sexes, sororities and clubs. In this state our codes contain sections declaring that "words used in the masculine gender include the feminine." While such sections apply specifically to the codes alone, they emphasize the fact that in the enactment of laws the legislature frequently employs the masculine gender in matters where it is evident that the feminine is not excluded. Even if the word "fraternity" could be said to mean an organization of males only, it might still be apparent from the context that it was used in a sense to include the opposite sex also. But without resorting to any such latitude of construction, the word itself has a broader signification. We find the following dictionary definitions of "fraternity":

Standard Dictionary: "Brotherhood or sisterhood in general"; "a body of persons associated or held to be associated together by common interests or characteristics"; "a brotherhood or sisterhood." "Greek-letter fraternities. (U. S.) College literary or social organizations known by the initial letter of a Greek motto or the like, and consisting usually of affiliated chapters. . . ."

Webster's International Dictionary: "The state or quality of being fraternal or brotherly; brotherhood . . . company; a brotherhood; a society."

Thus it is manifest that the word "fraternity" in the title is broad enough to include "sorority" and "club" mentioned in the body of the statute. We conclude, therefore, that the body of the act is not broader than the title.

Finally, we are unable to perceive that the statute is, as claimed by appellant, repugnant to the fourteenth amendment to the federal constitution, because it deprives a citizen of the right to attend a public school of the state. The part of the constitutional provision relied upon by appellant reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It has been held that rights and privileges granted to citizens which depend solely upon the laws of a state are not within this constitutional inhibition. (*Cory v. Carter*, 48 Ind.

327, [17 Am. Rep. 738]; *Marshall v. Donovan*, 10 Bush (Ky.), 681; *People ex rel. King v. Gallagher*, 93 N. Y. 438, [45 Am. Rep. 232].) The system of public schools of this state is a state institution, and is subject to the exclusive control of the constitutional authorities of the state. It is, of course, true that the right of attending a public school is capable of enforcement at law, but it is not such a right as is guaranteed by the above-quoted provision of the federal constitution. "The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and, therefore, so far as the 'privileges and immunities' clause of the fourteenth amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state." (6 Am. & Eng. Ency. of Law, p. 77.) In *Ward v. Flood*, 48 Cal. 36, [17 Am. Rep. 405], it was said: "It will indeed be readily conceded that the privilege accorded to the youth of the state by the law of the state, of attending the public schools maintained at the expense of the state, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere *status* of citizenship; and it is perhaps hardly necessary to add that assuredly no person can be said to have been deprived of either life, liberty or property because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put."

We are of the opinion that the statute attacked by appellant is valid and constitutional, and that the judgment appealed from should be affirmed, and it is so ordered.

Lennon, P. J., and Hall, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 9, 1912.

[Civ. No. 881. First Appellate District.—January 12, 1912.]

**HENRY THOMPSON, Appellant, v. SAN FRANCISCO
GAS AND ELECTRIC COMPANY, Respondent.**

ACTION FOR REFUSAL TO FURNISH ELECTRICITY—WAIVER OF OBJECTION TO DEMAND—WAIVER OF RIGHTS UNDER LAW.—In an action for damages for the wrongful refusal of the defendant to furnish electricity for plaintiff's use, where the defendant company made no objection to the form of plaintiff's demand, but presented an application for plaintiff's signature, which was in effect a contract containing several conditions, at least one of which the company conceded it was not entitled to require, it must be held to have waived any objection to the plaintiff's demand, and also to have waived any matters and things it would have been entitled to under the law applicable to such proposed contract.

ID.—WAIVER OF RIGHT TO INSIST UPON DIFFERENT APPLICATION.—Where the application presented for signature is in an agreement which contains a promise to abide by certain unreasonable and illegal rules and regulations adopted by the company, so that the applicant could not sign the same without being bound by the promise, the company, by presenting the application in that shape, waives the right to insist upon the application in any other form.

ID.—UNCONSTITUTIONAL AMENDMENT TO CODE AS TO PENALTY AGAINST CORPORATION AS TO ELECTRICITY—PENALTY NOT AN EXCLUSIVE REMEDY.—Though plaintiff's action appears to be founded on section 629 of the Civil Code, providing for penalties against a corporation for its refusal to furnish electricity as therein provided, and that section as originally enacted in 1872 applied to a refusal of a corporation to furnish gas, and was then constitutional, but was amended in 1905, by repeal and re-enactment, to include the same penalty for refusal of the corporation to furnish electricity, under the new constitution, which provided for electrical transmission lines by any natural person or corporation, and that section as amended failed by oversight to include penalties against a natural person, if it is unconstitutional for that reason, yet an action to recover the penalty is not an exclusive remedy.

ID.—ACTION FOR DAMAGES—REFUSAL OF ELECTRICITY BY CORPORATION—CAUSE OF ACTION.—If the defendant which is a *quasi*-public corporation, enjoying the privilege under the constitution of using the public streets of the municipality for the location and maintenance of its conduits and transmission lines, wrongfully refused to furnish the plaintiff with any electricity, the plaintiff had a good cause of action against the defendant, independent of section 629 of the Civil Code, for whatever damages he may have suffered as the result of such refusal.

ID.—IMPROPER DEMURRER TO COMPLAINT—CAUSE OF ACTION FOR ORDINARY DAMAGES.—Notwithstanding the plaintiff has stated a case within the terms of section 629 of the Civil Code, and if no cause of action is set forth thereunder, because of its unconstitutionality, still, where the complaint contains facts sufficient to state a cause of action for civil or ordinary damages in the sum of \$540, by reasons of defendant's failure to give the service demanded, a demurrer to the complaint was improperly sustained, and should have been overruled.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Henry Thompson, Appellant, *in pro. per.*

William B. Bosley, for Respondent.

LENNON, P. J.—Action for damages for wrongful refusal to furnish electricity to light plaintiff's apartment.

Plaintiff alleges in his complaint that the defendant is a corporation organized and existing in the state of California for the purpose of supplying for public use gas and electric light; that the plaintiff was at all times mentioned in the complaint the occupant of a certain described apartment in the city and county of San Francisco, which apartment was fitted for using electricity, and was situated within the territory served by said company with gas and electric illumination. That in the month of October, 1909, the plaintiff made an application in writing to the defendant to be supplied with electricity at said apartment, but the defendant refused to furnish electricity for said apartment unless plaintiff would first fill out and sign a certain form of application (a copy of which is set forth in the complaint), and pay to the company the sum of \$2.50 for installing a meter and making service connections. Plaintiff also alleges that at all times mentioned he was willing, ready and able to pay all reasonable and proper charges for said electricity, but that he refused to sign said application, and that defendant declined to furnish him with the requested current, and has failed and neglected to do so. By reason of all of which the plaintiff

alleges that he was damaged in the sum of \$540, for which he prays judgment, together with costs.

Defendant filed a general demurrer to the complaint, which, after argument, was sustained by the court, and the plaintiff, declining to amend, judgment was regularly entered thereon in favor of defendant, from which judgment plaintiff prosecutes this appeal.

In support of the correctness of the court's ruling sustaining the demurrer, defendant claims that plaintiff's application to be furnished with electricity was insufficient to impose upon defendant the obligation to do so, in that plaintiff did not offer to pay the legal rate therefor and to abide by all reasonable regulations of the company, nor did he therein or at all specify how much electricity he would require.

To sustain this position the following authorities may be cited: 20 Cyc. 1161; *Hieronymous v. Bienville Water Supply Co.*, 131 Ala. 447, [31 South. 31]; *Robbins v. Bangor Ry. & Elec. Co.*, 100 Me. 496, [1 L. R. A., N. S., 963, 62 Atl. 136]; *Buffalo County Telephone Co. v. Turner*, 82 Neb. 841, [130 Am. St. Rep. 699, 19 L. R. A., N. S., 693, 118 N. W. 1064]; *Williams v. Mutual Gas Co.*, 52 Mich. 499, [50 Am. Rep. 266, 18 N. W. 236]; *Smith v. Capital Gas Co.*, 132 Cal. 209, [54 L. R. A. 769, 64 Pac. 258]; Ives and Mason on the Control of Public Utilities; *Andrews v. N. R. E. L. & P. Co.*, 23 Misc. Rep. 512, [51 N. Y. Supp. 872]; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, [82 Am. Dec. 679].

The company also contends that it was entitled to the amount demanded as compensation for installing an electric meter and for making the necessary service connections with the plaintiff's apartment, citing some of the cases just adverted to. The company, however, made no objection to the form of plaintiff's demand, but presented the plaintiff with an application which was in effect a contract, and told him that unless he signed it the company would refuse to comply with his request. The proposed document contained a great many conditions, one of which at least the company now concedes it was not entitled to require. It must therefore be held that the company waived any objection to the demand by the plaintiff, or to the matters and things which, under the cases cited, the company may have been entitled. This conclusion is supported by authority, and seems to us to be

sound and logical. In the case of *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, [82 Am. Dec. 679], the syllabus correctly states the point decided as follows: "Gas company cannot require person to sign written application for gas, stating the number of burners, etc., which it might otherwise require him to sign, where the application is in an agreement, which contains a promise to abide by certain unreasonable and illegal rules and regulations adopted by the company, so that he could not sign the application without being bound by the promise; and the company, by presenting the application in that shape, waives its right to insist upon the application in any other."

Plaintiff's action appears to be founded on section 629 of the Civil Code, which provides: "Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter."

It will be observed that this section imposes a penalty for failure to comply with its terms on corporations furnishing gas and electricity, and leaves free from such penalty natural persons and copartnerships engaged in the same business who may be guilty of a like omission. Defendant contends that for this reason the statute is repugnant to section 11 of article 1 of the constitution, which reads: "All laws of a general nature shall have a uniform operation."

The section of the Civil Code in question was enacted in the year 1872 and was based on the statute of 1863 (Stats. 1863, p. 647), at both of which times a discrimination of this nature was not prohibited by the constitution. Much litigation grew out of this section, and it was regarded of course as a valid piece of legislation. But in the year 1905, in

amending this section so as to make its provisions apply to the furnishing of electric current as well as gas, it was repealed and immediately re-enacted, and the legislature omitted, inadvertently no doubt, to preclude all question as to its constitutionality under the provision of the new constitution of 1879 relied on here, by making it apply not only to corporations, but also to individuals and copartnerships engaged in the same business. Under section 19 of article XI of the constitution, any natural person or corporation engaged in the business of furnishing artificial illumination to the public may, in order to do so, use, as therein prescribed, the public streets in any municipal corporation for the purpose of laying or erecting its gas conduits and electrical transmission lines. And it would seem, as argued by defendant, that there is no reason in law or in the nature of things why a natural person or a firm engaged in the business of supplying the public with illumination should not be subject to exactly the same penalties as corporations thus engaged. (*Johnson v. Goodyear Mining Co.*, 127 Cal. 4, [78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304]; *Gulf etc. R. Co. v. Ellis*, 165 U. S. 150, [41 L. Ed. 666, 17 Sup. Ct. Rep. 255]. Compare *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, [116 Pac. 557], decided June 5, 1911.) But the view we have reached on another phase of this case renders a decision of this point unnecessary.

It will be conceded that if the defendant—a quasi-public corporation, enjoying the privilege under the constitution of using the public streets of the municipality for the location and maintenance of its conduits and transmission lines—wrongfully refused to furnish the plaintiff with electricity, the plaintiff had a good cause of action against the defendant, independent of section 629 of the Civil Code, for whatever damages he may have suffered as the result of such refusal (20 Cyc. 1163b and 1164); in other words, an action for the penalty provided by statute is not exclusive. (16 Ency. of Pl. & Pr. 244, 283; 20 Ency. of Pl. & Pr. 603; 3 Sutherland on Code Pleading and Practice, sec. 5027; *Pearkes v. Freer*, 9 Cal. 642.) See, also, *Indiana Nat. & Ill. Gas Co. v. Anthony*, 26 Ind. App. 307, 312, [58 N. E. 868], where, in passing on a similar point, the court said that a city ordinance, providing a penalty for failure of a gas company to supply gas as therein

prescribed, did not interfere with the right of a person to maintain an action on his own behalf for the recovery of such damages as he may have suffered. In the case at bar the plaintiff by appropriate allegations has stated a case within the terms of section 629 of the Civil Code, but if no cause of action is set forth thereunder because of the unconstitutionality of the section, still the demurrer should have been overruled if the complaint contains facts sufficient to constitute a cause of action for what we may call civil or ordinary damages. This we think the complaint does. If section 629 is, as claimed in effect by defendant, to be regarded as though nonexistent, still we find plaintiff alleging in a complaint—good, we think, as against a general demurrer—that he was damaged generally in the sum of \$540 by reason of defendant's failure to give the service demanded. The demurrer, therefore, should have been overruled.

The judgment is reversed and the cause remanded, with directions to the trial court to overrule the demurrer to the complaint.

Kerrigan, J., and Hall, J., concurred.

[Civ. No 372. Third Appellate District.—January 13, 1912.]

FRANK A. MACHADO, Respondent, v. D. J. CANTY,
Appellant.

ACTION TO QUIET TITLE—FINDINGS—SUPPORT OF JUDGMENT—TITLE UNDER UNITED STATES PATENT—VOID TAX SALE OF PUBLIC DOMAIN.—In an action to quiet title by a plaintiff, alleging ownership in fee under a United States patent, in pursuance of a homestead entry made June 1, 1897, as against a defendant claiming a tax title under the state, by a sale of the public domain for taxes of the year 1895, where the findings cover all of the issues presented, it is held that the judgment for the plaintiff follows logically and necessarily from the facts found; that the tax sale of the public domain is void under the law, and that the finding as to plaintiff's ownership in fee is of an ultimate fact, sufficient to support the judgment.

1D.—ABSENCE OF CONFLICT IN FINDINGS—CONSTRUCTION OF UNCERTAIN FINDINGS—PRESUMPTION AS TO ABSENT FINDING.—It is held that

there is no conflict in the findings, when taken together; and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it; and that if it were the fact that the findings do not cover all of the material issues, in the condition of the record, it would be presumed that any omission therein was without prejudice; though it is held that the findings do cover all of the essential allegations of the pleadings.

1a.—JUDGMENT QUIETING TITLE AGAINST VOID TAX TITLE—REFUNDING OF TAXES PAID NOT REQUIRED.—It is held that it was not error for the trial court to render a judgment for the plaintiff quieting his title, as against the void tax title held by the defendant, without requiring the plaintiff to pay to the defendant the amount that was paid for the property at the tax sale. The state had no right to assess taxes on the land of the United States, and a tax title thereunder could convey no title to the state, and it could convey none to defendant. The taxes paid by him were voluntary and cannot be recovered; and he can claim no subsequent taxes, or lien therefor, which has not been acquired by him.

1b.—JUDGMENT RIGHT UPON MERITS NOT REVERSIBLE FOR IMMATERIAL NEW EVIDENCE.—It is held that the judgment rendered by the superior court should be affirmed, and cannot be reversed and remanded for a new trial, upon a showing of evidence newly discovered pending the appeal which is stated to be upon information of a witness not produced, and shows that the evidence stated would be immaterial, upon a new trial, as it merely states that in 1895, when the public domain was assessed, a homestead claimant was then in possession, which shows a title then in the United States, which was not subject to taxation by the state. The law in force at the time of the assessment must govern.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

Carter & Carter, and Royle A. Carter, for Appellant.

Sutherland & Barbour, for Respondent.

BURNETT, J.—The action, brought in the usual form to quiet title, resulted in a judgment for plaintiff, from which the appeal is taken on the judgment-roll.

The decisive question is whether the findings support the judgment. The court found: "That the plaintiff is now, and for more than three years prior to the commencement of this

action has been, the owner, in fee and entitled to the possession of that certain real property [describing it]. That the defendant, D. J. Canty, claims some right, title or interest in said real property adverse to said plaintiff; that the said claim of defendant is based upon a certain assessment of said property for state and county taxes of the year 1895, for which taxes said property was purported to have been sold to the state of California by the tax collector of the county of Fresno, state aforesaid, on July 3, 1896, said tax collector's certificate of such purported sale being thereupon issued to said state, also upon said tax collector's deed dated on or about July 8, 1901, purporting to convey the title to said premises to the state of California, and also upon said tax collector's deed to defendant, dated May 31, 1905, purporting to convey to defendant all of the interest of the state of California in and to said real property. That at the time said assessment was levied upon said real property, and during the entire year 1895, said land was a part of the public domain of the United States of America, and not subject to taxation by the state of California. That on or about the first day of June, 1897, plaintiff made application to enter upon said land as a homestead entryman, said application being numbered 9596, and thereafter, on or about the twenty-second day of August, 1904, final certificate No. 4641 was issued by the general land office of the United States of America to plaintiff, and on March 8, 1905, letters patent of said land were issued by the United States of America to plaintiff, conveying to plaintiff the absolute title thereto." Then follow the conclusions of law that said assessment and tax deed were void, that defendant has no interest in the property, and that plaintiff is the owner in fee simple and entitled to the possession thereof, and directing a decree in accordance with the prayer of the complaint.

That the judgment in favor of plaintiff follows logically and necessarily from the facts found seems beyond candid controversy. The only pretense of an argument that could be made to the contrary is based upon the assumption that the purported findings of fact are in reality but a statement of legal conclusions. This is, however, opposed to the correct view of the situation. The finding that plaintiff "is the owner in fee" of the property is of an ultimate fact and is

sufficient to support the judgment. (*Smith v. Acker*, 52 Cal. 217; *Frazier v. Crowell*, 52 Cal. 399; *Murphy v. Bennett*, 68 Cal. 531, [9 Pac. 638].)

Nor is there any conflict in the findings. Appellant contends that "Finding 5 expressly declares that, from and including the year 1895 [the year of the assessment], the property was subject to the rights of plaintiff though the title was in the United States." As pointed out by respondent, this is not a fair inference from said finding. The language is: "That during said period from and including the year 1895 to March 8, 1905, title to said lands was in the United States of America subject only to the rights of said plaintiff as a homestead entryman thereon, as aforesaid." The rights of plaintiff "as aforesaid" are determined by the preceding finding. Therein it is disclosed that he had no right in the premises till about the first day of June, 1897, when he "made application to enter upon said land as a homestead entryman." Of course, any uncertainty in the findings is to be construed so as to support the judgment rather than defeat it. (*Warren v. Hopkins*, 110 Cal. 506, [42 Pac. 986].)

There is no merit in the contention that the findings do not cover all the material issues. If such were the fact, in the condition of the record the presumption would be that it was without prejudice. (*Krasky v. Wollpert*, 134 Cal. 338, [66 Pac. 309].) We deem it sufficient to say that not only do the findings support the judgment, but they cover all the essential allegations of the pleadings.

It was not error for the trial court to render judgment for plaintiff without requiring him to pay defendant the amount that defendant paid for said property at the tax sale. The cases cited by appellant are not in point here, as the land in controversy before us was not subject to taxation by the state at the time of the assessment. In the case of *Brooks v. County of Tulare*, 117 Cal. 468, [49 Pac. 470], it is said: "It will be observed that there is a plain distinction between the Hayes case and this. Here, the plaintiff knew, or might have known, when he made his bid and paid his money, whether the land was vacant public land or not. It may be that someone had a possessory claim on the land which was subject to assessment. At any rate, his bid was voluntary and he cannot now maintain an action to recover

back the money paid." As pointed out by respondent, the Brooks case involved an action to recover from the county the amount paid by the purchaser of a tax title, based upon an assessment of land which was at the time of said assessment a part of the public domain of the United States. Other authorities cited by respondent are: *Preston v. Hirsch*, 5 Cal. App. 485, [90 Pac. 965]; *Norris v. Russell*, 5 Cal. 249; *Harper v. Rowe*, 53 Cal. 233; *Loomis v. Los Angeles County*, 59 Cal. 456; *Pennock v. Douglas County*, 39 Neb. 293, [42 Am. St. Rep. 579, 27 L. R. A. 121, 58 N. W. 117]; *Mitchell v. Minnequa Town Co.*, 47 Colo. 367, [92 Pac. 678]. The situation seems to be substantially covered by the following statement made by respondent: "This land was assessed for taxes in the year 1895 when the title to the same was in the United States, and the state had no right to assess the land. Defendant holds a tax deed based upon this illegal assessment. His tax deed is void and he has no rights whatever in this land or against this plaintiff. He is not entitled to the land because the state had no title to convey to him. He is not entitled to a refund of the money paid by him for the tax title for the reason that such payment was a voluntary payment on the part of the defendant. He is not entitled to a refund of the taxes for the years 1898 to 1904 for the reason that a void sale for the taxes of the year 1895 could not convey title for the years 1898 to 1904, and any lien that the state may have against this land has not been acquired by defendant."

When the case was called here for oral argument appellant filed a petition praying that the cause be remanded to the superior court of the county of Fresno, in which the action was tried, for a new trial and for the purpose of taking new and additional testimony, or that this court reopen the case and allow petitioner to make the additional showing here and present the evidence in proper form as the court may direct. The petition was based upon the ground of evidence discovered after the appeal was taken herein and was supported by an affidavit setting out said newly discovered evidence. Our attention has not been called to any case where such proceeding has been taken before in this state. Appellant has cited two or three decisions from North Carolina where the practice seems to have been countenanced.

In one of these, *Sikes v. Parker*, 95 N. C. 232, it is stated that "It has been frequently held that this court will always entertain such a motion with caution and scrutiny, and will not grant a new trial except in a clear case coming within the settled rules of practice in such respect." We need not, however, consider the question whether in this court under any circumstances such a motion could be granted, for we are satisfied that for two reasons stated by respondent the application must be denied. In the first place, appellant relies upon statements and admissions made by respondent in a conversation with a man by the name of McCord. But there is no affidavit from McCord, and all the material facts and circumstances recited in appellant's affidavit are based upon information and belief growing out of statements made to him by McCord who is only identified "as a man by the name of McCord." Such showing is manifestly too meager and uncertain to justify a court in setting aside a solemn judgment.

Again, the newly discovered evidence would be immaterial if a new trial were granted. The information upon which appellant relies is that one "M. F. Johnson entered and located the land involved in this action under the homestead entry laws of the United States. That said M. F. Johnson occupied said land, and held possession thereof under said entry, with intent to obtain a patent to said land, from some time previous to the date of the levy of said assessment, until after said levy of said assessment was made and after said property was sold for taxes to the state of California, under the sale under which your petitioner claims title, and that said M. F. Johnson was in possession of said property under said entry and entitled to possession of the same, at the time said assessment was levied, and said property was sold for taxes on said property, and on the improvements thereon, and on the personal property of said M. F. Johnson." We agree with respondent that the law in force at the time of the assessment of the taxes in question was that property belonging to the United States was not subject to taxation (Pol. Code, sec. 3607). If not subject to taxation it could not be sold to satisfy any illegal assessment. And the law in force at the time the assessment was levied is the law governing the case. But, by the affidavit in question, it is

made to appear that at the time said levy was made the title was in the United States. "It is therefore apparent," as respondent states, "that the evidence of which appellant now seeks to have the court take cognizance can have no possible bearing on the case at bar, for the reason that if material at all, it could only be material under the statutes enacted subsequent to the assessment in question."

We think the judgment of the court below is right, and should be affirmed, and the motion to reopen the case should be denied. It is so ordered.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 1048. Second Appellate District.—January 15, 1912.]

MARY E. S. FURMAN, Respondent, v. GEORGE F. CRAINE et al., Appellants; JAMES O. CRAINE, JAMES O. CRAINE, as Administrator of the Estate of MARGARET E. CLEVELAND, Deceased, Respondent.

SPECIFIC PERFORMANCE—CONTRACT TO ADOPT CHILD AS HEIR—EQUITABLE OWNERSHIP OF ESTATE.—Where the parents of a daughter four years old agreed with its childless widowed aunt to surrender to her all control of the child, under a written contract that, in consideration thereof, she would adopt, rear and educate it as her own child and make it her heir at law, so that it would inherit her property at her death, and the parents performed all on their part, and the child became and remained in her aunt's home as her daughter, and performed all the duties of a daughter in her home until married, after which she still held her relations toward the aunt as her mother, until her death, about twenty-four years from the date of the contract, a court of equity will enforce specific performance of the contract, as against collateral heirs, and decree her to be the equitable owner of the estate as against them.

ID.—SPECIAL GROUND FOR RELIEF IN EQUITY—ADEQUATE COMPENSATION NOT ESTIMABLE.—The surrender of their child on the part of the parents, the presumed detriment to the plaintiff from the severing of the paternal ties, and the love, obedience and companionship given to the aunt, followed by the relationship assumed between them, consisting of numerous and nameless delicate services and attentions, cannot be measured in gold. The law furnishes no

standard by which the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract.

ID.—PRESENTATION OF CLAIM AGAINST ESTATE NOT REQUIRED—ENFORCEMENT OF EQUITABLE OWNERSHIP—TRANSFER OF TITLE.—It was not necessary that the complaint should show that, before the filing thereof, the plaintiff presented a demand or claim for the property to the administrator. Sections 1493 and 1500 of the Code of Civil Procedure, as to the presentation of claims, have no reference to an action for specific performance, in which it is not claimed that the estate is indebted to plaintiff, or that she holds any claim payable out of the estate in the course of administration; but that plaintiff is the equitable owner of the whole residue of the estate, and as such entitled to a conveyance from those having the legal title.

ID.—ADMINISTRATOR AS A PARTY—ORDINARY RULE—INJUNCTION.—Ordinarily, it is not necessary or proper that the administrator should be a party to such an action; but it is held that, in this case, the administrator was a proper party to the present action, in order to enjoin him from paying or delivering any part of the estate to the collateral heirs, who are defendants to the action.

ID.—ACCRUAL OF CAUSE OF ACTION—DEATH OF AUNT—ABSENCE OF LACHES.—The cause of action, involved in the action for specific performance of the contract of heirship, did not accrue until the date of the death of the adopting aunt. The adoption was not the cause of action, but merely the means of obtaining the property left at her death. Where the action was brought within two years from the date of her death, and in time to enforce specific performance of the contract of heirship before distribution of the estate, the action is not barred by limitation nor by laches. Mere delay for a period of time less than the statute of limitations does not constitute laches.

ID.—LOSS OF WRITTEN CONTRACT—MUTILATED COPY—PAROL EVIDENCE OF CONTENTS.—Where the agreement between the aunt and plaintiff's parents was executed in duplicate, and both copies were left with the aunt, and at the time of her death only one mutilated copy was found, disclosing the signatures of the parties and the names of the witnesses, but containing little of the substance of the agreement, and the other copy could not be found after diligent search, the evidence was sufficient to establish the loss and to admit parol evidence of its contents.

ID.—COMPETENCY OF WITNESS TO CONTENTS—PARENTS OF PLAINTIFF—ADMINISTRATOR AS PARTY.—The cause of action not being upon a claim against the estate of a deceased person, within subdivision 3 of section 1880 of the Code of Civil Procedure, the parents of the plaintiff, the father of whom was the administrator of the estate of the deceased aunt, not a necessary party to the action,

were competent to testify to the contents of the lost and mutilated instrument.

ID.—PROPER TESTIMONY OF PLAINTIFF.—The plaintiff was properly permitted to show that she performed the obligations and duties devolving upon her as the daughter of the deceased, not as a mere stranger, but in reliance upon the status of mother and daughter which she believed to exist, and that her belief was justified by the conduct and representations made to her by the deceased.

ID.—OTHER COMPETENT TESTIMONY—CONVERSATIONS, CONDUCT AND ACTIONS OF AUNT—CONSTRUCTION OF CONTRACT.—It was proper to prove by witnesses, including the depositions of witnesses properly taken, conversations, conduct and actions on the part of the aunt, which tended to show that she construed the agreement as creating the relation between her and the plaintiff of mother and child by adoption.

ID.—ANSWER PROPERLY STRICKEN OUT—ALLEGED FRAUD OF PLAINTIFF AND HER FATHER—FABRICATION OF TESTIMONY.—Where the answer properly took issue upon the alleged agreement, an averment therein that plaintiff and her father had conspired together in fabricating testimony to prove the existence of the alleged contract, knowing that no such contract had been made, was properly stricken out.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial. M. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Murphy & Poplin, Shankland & Chandler, and C. White Mortimer, for Appellants.

John H. O'Connor, and Hunsaker & Britt, for Plaintiff, Respondent.

James P. Hogan, and M. M. Meyers, for Defendant, Respondent.

SHAW, J.—It appears from the findings that on June 2, 1884, when plaintiff was four years of age, Margaret E. Synnot, who at the time of her death was known as Margaret E. Cleaveland, a childless, widowed sister of defendant James O. Craine, made an agreement in writing with the latter and his then wife, Emma Craine, who were the father and mother of plaintiff, whereby they forever surrendered

to Synnot the control, custody and society of plaintiff, and relinquished to her all claims and rights which they had to and over plaintiff by reason of being her parents, in consideration of which Synnot agreed to take, adopt, rear and educate plaintiff as her own child, and give her all the rights of a child in and to her estate and to make plaintiff her heir at law so she would inherit the property of Synnot upon the latter's death. Plaintiff's parents fully performed all of the conditions on their part agreed to be performed, and Synnot upon the execution of the agreement took charge of plaintiff and thenceforward, until plaintiff's marriage in November, 1900, had and exercised exclusive control, custody and care of plaintiff in all respects as her adopted daughter, and during all of said time plaintiff lived with Margaret E. Synnot as a member of her family and performed all the duties and obligations of a daughter to her up to the time of her said marriage, after which, though occupying a residence of her own, she continued to discharge her duties as a daughter of Margaret E. Synnot, until the latter died, intestate, on April 23, 1908, leaving neither issue, husband, father nor mother surviving her. That while said Margaret E. Synnot did not legally adopt plaintiff, she frequently stated to plaintiff, and to others in her presence, that she had adopted plaintiff, and that plaintiff was her heir at law and upon her death would inherit her estate, by reason whereof plaintiff was led to believe, and did believe, that she was the legally adopted daughter and heir at law of said Synnot, and in reliance thereupon after she came to years of discretion she remained with said Margaret E. Synnot as a member of her family and gave her the affection and obedience of and in all respects conducted herself as the daughter of said Margaret E. Synnot. That plaintiff's parents and Margaret E. Synnot believed and understood that the agreement so entered into between them had the legal effect of establishing between plaintiff and said Margaret E. Synnot the relation of child and parent, and conferred upon plaintiff the statute and rights of an adopted child. At the time of the commencement of the suit, all of the claims against the estate and all costs and expenses of administration had been paid, and the estate was ready for distribution.

The defendants appealing are nephews and nieces of two deceased brothers and a deceased sister of Margaret E. Synnot. James O. Craine was the administrator of the estate of said Margaret E. Synnot, deceased, and as such was made a party defendant in the action upon an allegation therein to the effect that he would, unless restrained by the process of court, pay over and deliver to said defendants the estate so remaining in his hands for final distribution. The court by its judgment declared plaintiff to be the equitable owner of all the estate remaining in the hands of the administrator for distribution, and adjudged and decreed that the defendants, other than James O. Craine as administrator of said estate, held the legal title to all said property in trust for the benefit of plaintiff, and that they, or in default of so doing, that the clerk of the court execute to plaintiff a conveyance sufficient in law to transfer said property to her, and enjoining James O. Craine from the payment or delivery of any of said property to any of said defendants in pursuance of any decree of distribution which may be made in the matter of said estate.

The appeal is from the judgment and from an order of court denying defendants' motion for a new trial.

1. The right of plaintiff to have specific enforcement of the alleged contract upon the facts found is supported by overwhelming authority. (*Van Tine v. Van Tine* (N. J.), 1 L. R. A. 155, 15 Atl. 249; *Healey v. Simpson*, 113 Mo. 340, [20 S. W. 881]; *Sharkey v. McDermott*, 91 Mo. 647, [60 Am. Rep. 270, 4 S. W. 107]; *Burns v. Smith*, 21 Mont. 251, [69 Am. St. Rep. 653, 53 Pac. 742]; *Johnson v. Hubbell*, 10 N. J. Eq. 332, [66 Am. Dec. 773].) While in the case of *Owens v. McNally*, 113 Cal. 444, [33 L. R. A. 369, 45 Pac. 710], specific performance was denied as against the widow of deceased, the ground therefor clearly distinguishing the case from this, it was there said, with reference to a like agreement, that "a court of equity will enforce such an agreement specifically by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract." That there was an adequate consideration for the promise fully appears, it being shown that when plaintiff was four years of age the relation existing by nature between plaintiff and her parents was

severed, and in lieu thereof an artificial relation created for the purpose of satisfying the maternal cravings of this childless aunt. Plaintiff entered her household as her child and she, her parents and her aunt, upon sufficient grounds, thought and believed that she had been adopted as the child of Margaret E. Synnot, and thenceforward for nearly twenty-four years she was so recognized by Synnot. The surrender of their child on the part of the parents, the presumed detriment to plaintiff due to the severing of the paternal ties, and the love, obedience and companionship given the aunt, followed by the establishment of the artificial relation, cannot be measured in gold. "There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract." (*Sutton v. Hayden*, 62 Mo. 101; *Healey v. Simpson*, 113 Mo. 340, [20 S. W. 881].)

2. Defendants appealing demurred to the complaint upon the ground, that, inasmuch as it did not appear therefrom that plaintiff, prior to filing the same, had presented to the administrator any demand or claim for the property, as provided in sections 1493 and 1500, Code of Civil Procedure, it did not state facts sufficient to constitute a cause of action. The action of the court in overruling the demurrer is assigned as error. These sections of the code have no reference to actions of the character here presented. Plaintiff did not claim that the estate was indebted to her, and she held no claim payable out of the estate in course of administration. Her contention is that she is the sole beneficiary of a trust impressed upon the property remaining after the payment of costs of administration and all claims against it, and as such equitable owner entitled to a conveyance thereof from those holding the legal title. In an action the purpose of which is merely to enforce such trust by way of specific performance, and in the absence of any affirmative relief being asked against the administrator, he is not a necessary, or even proper, party defendant. In the case at bar he is prop-

erly made a party defendant because of allegations showing a necessity for the order asked restraining him from paying or delivering the property to the defendants. That the asserted ownership of the property, based upon the existence of a trust created by the owner thereof in her lifetime for the benefit of plaintiff, is not a claim within the meaning of sections 1493, 1495 and 1500, Code of Civil Procedure, is sustained by numerous authorities. (See *Fallon v. Butler*, 21 Cal. 24, [81 Am. Dec. 140]; *Estate of Swain*, 67 Cal. 637, [8 Pac. 497]; *McCabe v. Healy*, 138 Cal. 81, [70 Pac. 1008]; *Estate of Dutard*, 147 Cal. 253, [81 Pac. 519].) An examination of the authorities cited by appellants to the contrary discloses that they were all cases involving claims properly so called, against an estate for money, and wherein it was sought to establish the right thereto by action instituted against the administrator or executor of decedent.

3. For like reasons, the court did not err in sustaining the demurrer to the second separate defense contained in the answer, since it was based upon the failure of plaintiff to present the claim for allowance in accordance with the provisions of said sections 1493 and 1500, Code of Civil Procedure.

4. It is claimed that the court erred in sustaining plaintiff's demurrer to the fifth separate defense set up in the answer, wherein defendants pleaded laches of plaintiff in bringing the suit. The cause of action here involved is based upon plaintiff's right to inherit the property of Margaret E. Synnot at her death. Hence, no cause of action accrued until her demise on April 23, 1908. The suit was brought within less than two years from that date, and therefore was not barred by the provisions of the statute limiting the time within which such actions may be brought. As said by respondent: "Mere delay for a period of time less than that prescribed by the statute of limitations does not constitute laches." (*Lux v. Haggin*, 69 Cal. 255, [4 Pac. 919, 10 Pac. 674]; *Ex-Mission L. & W. Co. v. Flash*, 97 Cal. 610, [32 Pac. 600].) Moreover, the adoption was merely the means whereby to accomplish an end, viz., the transfer to plaintiff of the property owned by Synnot at the time of her death. While in the absence of other disposition by will, the intended purpose would have been accomplished by adoption, as a re-

sult of which plaintiff would have inherited as a natural child, nevertheless, had there been an adoption, and Synnot had by will devised the property to another, plaintiff would, by virtue of the agreement, have been entitled to maintain an action for the property as against such devise. The matter thus set up constituted no defense, and hence the court did not err in sustaining the demurrer.

5. The agreement between Margaret E. Synnot and plaintiff's parents was executed in duplicate, and Margaret E. Synnot took charge of both copies thereof. At the time of her death a mutilated copy containing little of the substance of the agreement, but disclosing the signatures of the parties thereto, together with those of the witnesses to the execution of the same, was found among her papers. A diligent search was made for the other copy, or the remainder of that found, but without avail. The evidence was sufficient to establish the loss and destruction of the instrument, and to admit of parol testimony in proof of its contents. There was no error in the line of evidence admitted for the purpose of establishing the loss nor in proof of the contents of the instrument by parol.

6. The testimony of the administrator, since he was not a proper party defendant, nor the action prosecuted upon a claim against the estate of Margaret E. Synnot, was competent evidence of the contents of the instrument. (*Poulson v. Stanley*, 122 Cal. 658, [68 Am. St. Rep. 73, 55 Pac. 605].)

7. Proof alone of the execution of the written instrument would not in itself have entitled plaintiff to recover. Since she had not been legally adopted as promised, nor otherwise given the immediate right of inheritance upon the death of her aunt, it was necessary and proper, when invoking the equitable intervention of the court, to show that she performed the obligations and duties devolving upon her as the daughter of deceased, not as a mere stranger, but in reliance upon a status which she believed to exist and which belief was justified by the conduct and representations made by the aunt. We perceive no error in admitting the plaintiff's testimony for such purpose.

8. In their answer defendants alleged that plaintiff and her father had conspired together in fabricating testimony to prove the existence of the alleged contract, knowing that no

such contract had been made. This was properly stricken out by the court. The allegation contained no affirmative matter, and hence presented no issue other than that tendered by the answer in specifically denying the execution of the agreement alleged in the complaint, and upon which the cause of action was based. The right of defendants to introduce evidence was in no wise abridged by the action of the court.

9. The claim that the evidence fails to support the findings as to the execution of the agreement and its contents is based upon the contention that under subdivision 3, section 1880, Code of Civil Procedure, neither the father nor mother of plaintiff was a competent witness to testify touching the subject. As we have seen, the action was not prosecuted upon a claim against an estate, and hence the admission of the testimony did not contravene the provisions of this section.

A number of alleged errors are predicated upon the rulings of the court in admitting and rejecting evidence. It is unnecessary to enter upon an extended discussion of these rulings; suffice it to say, we have considered all of them, and, in the light of what has heretofore been said, find no merit in the points based thereon. It was not improper to prove conversations, conduct and actions on the part of the aunt which tended to show that she construed the agreement as creating the relation between her and plaintiff of mother and child by adoption. (*Van Tine v. Van Tine* (N. J.), 1 L. R. A. 155, 15 Atl. 249.) We perceive no error in the ruling of the court in admitting in evidence the deposition of Thomas Eileman and Mrs. Anna Duey. The stipulation of attorneys, considered with the evidence of the clerk and the record, sufficiently identifies it as a deposition taken to be used in the trial of the case under a commission duly issued authorizing the taking of the same.

We find no prejudicial error in the record, and the judgment and order are, therefore, affirmed.

Allen, P. J., and James, J., concurred.

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[Civ. No. 1126. Second Appellate District.—January 19, 1912.]

JOHN LAPIQUE, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY and Z. B. WEST, Judge, Respondents.

WRIT OF REVIEW—CERTIFICATION OF TRANSCRIPT BY JUDGE—APPEAL UNDER NEW METHOD—OMISSION OF REQUESTED PAPERS—JURISDICTION.—The only thing which a judge of the superior court is required to certify as a transcript on appeal under the new practice, in lieu of a bill of exceptions, is the stenographer's notes of the trial, containing the proceedings and evidence which would form no part of the record unless authenticated as the statute requires. The court in signing such a transcript does not exceed its jurisdiction in omitting papers requested by the appellant which appear to be irrelevant; but if the fact were otherwise, and the requested papers should have been inserted, the court did not exceed its jurisdiction in signing such transcript as in its opinion is correct; and a writ of review will not lie on account of such omission.

ID.—OFFICE OF WRIT OF REVIEW.—The writ of review only lies where an inferior court or tribunal has acted without jurisdiction; and there is no other speedy and adequate remedy.

APPLICATION for writ of review of the action of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

Lewis Cruickshank, for Petitioner.

D. E. Bowman, for Respondents.

THE COURT.—An affidavit filed by petitioner discloses facts tending to show that he is the appellant in a certain action pending in this court on appeal from the superior court of Orange county; that the appeal was regularly taken, and that within the prescribed time he filed with the clerk a notice of the papers which he desired certified; that the clerk in preparing the transcript of such papers omitted therefrom papers specified in the notice, none of which papers appear to have had reference to or connection with any transcript required to be signed by a judge. He alleges that

the clerk's transcript was presented to the judge and that the judge made certain amendments thereto on his own motion, and that the clerk certified the transcript as amended. He asks this court to review the action of the superior court and to compel that court to certify the omitted papers.

The only thing a judge is "required to correct, approve and certify under the new practice in lieu of a bill of exceptions is the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record unless authenticated as the statute provides." (*Christenson Lumber Co. v. Seawell*, 157 Cal. 406, [108 Pac. 276].) But were the facts otherwise and the papers such as should be incorporated in a transcript to be authenticated by the judge, nevertheless, in determining the correctness of a transcript, the court has jurisdiction and authority to sign such transcript as in his opinion is correct. The writ of review only lies where the court acts without jurisdiction and there is no other speedy and adequate remedy. The court in signing a transcript, which by the statutes is to be authenticated by it, does not exceed its jurisdiction if it omits matters therefrom, and the writ of review would not lie on account of such omission.

Writ denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 18, 1912.

[Crim. No. 236. Second Appellate District.—January 19, 1912.]

In the Matter of the Application of MILTON NORTHERN,
for a Writ of Habeas Corpus.

CONTEMPT OUT OF VIEW OF COURT—REFUSAL TO PAY ALIMONY AND
COUNSEL FEES ORDERED—FACTS SHOWING JURISDICTION REQUIRED.—

The contempt for refusal to pay temporary alimony and counsel fees ordered by the court is one not committed in the immediate view and presence of the court, and the facts essential to show the jurisdiction of the court to proceed therewith must be embodied in an affidavit stating the facts constituting the contempt, presented to the court or judge, in the absence of any other showing provided for in section 1211 of the Code of Civil Procedure.

1D.—PROCEEDINGS IN CONTEMPT—JURISDICTION LIMITED—JURISDICTIONAL
FACTS IN RECORD.—In proceedings in contempt, the jurisdiction of the superior court is limited, and jurisdictional facts must be made to appear in the judgment and order of commitment for contempt.

1D.—VOID COMMITMENT TO COUNTY JAIL—HABEAS CORPUS.—In the absence of any affidavit stating the facts showing the contempt, and there being nothing in the record to show the jurisdiction of the court to commit the defendant to the county jail for contempt, the order so made by the court was without jurisdiction, and he is entitled as petitioner to be discharged upon writ of habeas corpus.

APPLICATION for discharge upon writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Lewis Cruickshank, for Petitioner.

D. E. Bowman, for Respondent.

THE COURT.—Petitioner is shown by the return to be held under a commitment specifying that a certain action came on regularly for hearing on an order to show cause *in re* contempt, and testimony having been heard on the part of both the plaintiff and the defendant, and it appearing to the satisfaction of the court that the defendant Northern had been guilty of contempt by reason of his refusal to obey the order of the court to pay temporary alimony and attorney's fees, which said order was made on October 16, 1911, and it further appearing to the court that said defendant Northern had ability to pay the same, it was, therefore, ordered, adjudged

and decreed that he be committed to the county jail until he should pay to the plaintiff Mildred Northern the sum of \$40.

The contempt for a refusal to pay pursuant to an order is one not committed in the immediate view and presence of the court, and under section 1211 of the Code of Civil Procedure, an affidavit presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees, arbitrators, or other judicial officers, is essential as giving the court jurisdiction to hear and determine the proceedings in contempt. Assuming that the case of *Northern v. Northern* was one in which a judgment for alimony could be rendered, which fact does not affirmatively appear, and that the court made an order requiring him to pay the sum of \$40, which fact also does not affirmatively appear, and that said Northern had ability to pay the same, nevertheless the court was without jurisdiction to punish for contempt, in the absence of an affidavit as provided by the section of the code above cited. In proceedings in contempt the jurisdiction of the superior court is limited, and jurisdictional facts must be made to appear in the judgment and the order of commitment. Considering the record, then, as presented in this case, the order made by the court was without jurisdiction, and the petitioner is entitled to his discharge, and it is so ordered.

[Civ. No. 880. First Appellate District.—January 22, 1912.]

GUY HINTON, Petitioner, Appellant, v. GEORGE H. BAHRS, CHARLES M. LEAVY, and FRANK C. MACDONALD, Civil Service Commissioners of the City and County of San Francisco, Respondents.

SAN FRANCISCO CHARTER—CLASSIFICATION OF CLERICAL SERVICE—DUTIES OF OFFICE—IMPROPER BASIS OF SALARIES—RESCISSION—MANDAMUS. The charter of the city and county of San Francisco requires the clerical service thereof to be based upon the duties to be performed by the clerks as classified by departments, and a classification by salaries is unauthorized by the charter. Where the municipal civil service commission had made an improper classification of the clerical service, by salaries, they were justified in rescinding the same and restoring a former classification as author-

ized by the charter; and a writ of mandate will not lie to compel the commissioners to restore the list of eligibles based upon an examination held under the classification by salaries.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

Guy Hinton, Appellant, *in propria persona*.

Percy V. Long, City Attorney, and John F. English, Assistant City Attorney, for Respondents.

KERRIGAN, J.—This is an appeal from a judgment in favor of respondents entered upon an order sustaining a general demurrer to the second amended petition for a writ of mandate.

The petition alleges: "That on June 9, 1908, the said commission created 'Class XXII. Clerks (Class b)' within 'Division A.—Clerical service,' of the classification of the civil service of said city and county. That subsequently, on March 30, 1909, said commission changed the designation of said class to 'Class IV—Clerks (Class b).' On said March 30 said commission for the first time defined said class as follows: 'Resolved, that all permanent positions as timekeepers, storekeepers, tabulators, filing clerks, and other positions having similar duties, and all permanent clerkships carrying salaries of \$1,440 per annum, or less, be and are hereby classified under the designation 'Clerks (Class B).' And further 'That applicants who qualify in this examination be eligible only for appointment to permanent positions carrying salaries of \$1,440 or less.' That prior to said March 30, 1909, there had been created by said civil service commission certain classes of experienced clerks in the classified civil service of said city and county of San Francisco, to wit: Experienced clerks, auditor's office; experienced clerks, board of public works; experienced clerks, board of health; and experienced clerks, tax collector's office. That on said March 30, 1909, the said civil service commission did strike from said classified civil service list said classes of experienced clerks, auditor's office, experienced

clerks, board of public works, and experienced clerks, board of health. And further said civil service commission did, on said March 30, pass a resolution to the effect that an examination for applicants for positions as clerks, class B, would be held on April 24, 1909.

"That said commission made rules to carry out the purposes of Article XIII of the charter of said city and county and in particular for examinations to be held thereunder; that thereafter, on the twenty-fourth day of April, 1909, it gave an examination for 'Clerks, Class B' under the above-mentioned classification . . .," resulting in the making up of a list of eligibles for this class, which included the name of the petitioner with many others, all of whom successfully passed the examination.

Subsequently on March 7, 1910, this classification "Clerks (Class B)" was abolished by the commission, the resolution in that regard reading: "Whereas, the classification 'Clerks (Class B)' and 'Clerks (Class C)' have been made to depend upon considerations of salary, and Whereas, the Charter requires that classifications shall be based upon examination, such examinations to be practical; therefore be it resolved, that the following classifications of 'Division A—Clerical Service' of the Classification of the classified civil service of San Francisco be and hereby are abolished: Class IV. Clerks (Class B.) . . ." And on the same day the commissioners restored the above-described classes of experienced clerks, and added a new class, to wit, "Experienced Clerks, Department of Electricity," and the class designated experienced clerks, tax collector's office, which had never been disturbed, was retained.

Since shortly after the adoption of the charter there has been in the classified civil service of San Francisco a general class designated as division A—clerical service, from which class appointments have been made by the different officers, under the civil service regulations of the charter, whenever employees of the character included in said class were required. Appointments to permanent positions have always been made from classes known as experienced clerks, and temporary places have been filled from the class known as ordinary clerks.

The respondents were warranted in their action of March 7, 1910, when they rescinded the resolution of March 30, 1909, abolishing the classification according to salaries and restoring the former classification based on duties to be performed. No doubt the efficiency of the different departments of the city and county government of San Francisco will be best promoted when applicants for employment are examined not with regard to their qualifications generally, but with regard to their aptitude to fill particular positions. The duties to be performed in the different departments are quite dissimilar. In the department of the board of health, for example, a clerk should be informed on health ordinances and regulations, with regard to such matters as the abatement of nuisances, restrictions as to contagious diseases and regulations as to sanitation. In the office of the board of public works, on the other hand, he might be required to know the numerous charter and ordinance provisions relative to sewers and street work, building regulations and the like, while in the tax collector's office, or any other department of the municipal government, the duties involved might require knowledge and experience of an entirely different character. It was for this reason, it is safe to say, that the charter provides that the civil service examinations "shall be practical in their character, and shall relate to the duties of the position" (charter of the city and county of San Francisco, article XIII, secs. 2 and 4). Section 10 of the same article also clearly contemplates that clerks shall be classified by departments, for in providing that the civil service commission shall fill vacancies by promotion it reads that an examination therefor "shall be competitive among such members of the next lower rank established by the Commission for each department."

The brief filed by *amicus curiae*, like those filed by the appellant, is interesting and instructive; but we do not feel that we would be warranted in passing upon the principal points discussed in the former, they not being involved in this case.

From what has been said it appears plain that the classification of March 30, 1909, as to salaries was not in accordance with the provisions of the charter, and that therefore the commission properly abandoned it, and cannot be compelled by writ of mandate to restore the list of eligibles based upon

an examination held under said classification of March 30, 1909.

The judgment appealed from is affirmed.

Hall, J., and Lennon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 25, 1912.

Beatty, C. J., dissented from the order denying a rehearing in the supreme court, and filed the following opinion on March 25, 1912:

BEATTY, C. J.—I dissent from the order denying a rehearing of this cause. The question presented for decision is not which system of classification of eligibles for employment in the clerical service of San Francisco is the better, but is whether the resolution of June 9, 1908, establishing "class B" was a valid exercise of the discretion of the commissioners. If it was, the petitioner, upon being enrolled in that class after successfully passing the prescribed examination, acquired a vested right, of which he could not be deprived short of two years, to be recommended in his turn for employment in any clerical position under the municipal government the annual salary of which was not in excess of \$1,440. I can see no reason for denying the power of the commissioners to establish the class, and while it was undoubtedly the right of their successors, or of themselves to rearrange the classification, they could not in that way deprive the petitioner and other eligibles of their right during the two year term. As to them the change could not take effect until that time had elapsed. (Charter, art. XIII, sec. 10.) It is, however, the misfortune of petitioner that this view, even if it had prevailed, would have afforded no relief, since his two year term had expired before a decision here could have been reached and the new and equally valid regulation has now displaced the resolution of 1908.

[Crim. No. 840. First Appellate District.—January 22, 1912.]

**THE PEOPLE, Respondent, v. C. HOWARD MERRITT,
Appellant.**

CRIMINAL LAW—ORDER DENYING ARREST OF JUDGMENT—REVIEW UPON APPEAL.—An order denying a motion in arrest of judgment in a criminal case is not appealable, but it may be reviewed upon appeal from the judgment.

ID.—CRIME UNDER ACT FOR PROTECTION OF STOCKHOLDERS—SCOPE OF TITLE.—A provision for the punishment as a crime of enumerated acts that may result in deceiving the stockholders of a corporation or others dealing therewith comes within the general scope of the title of "An act to protect stockholders and persons dealing with corporations in this state."

ID.—TITLE OF AMENDATORY ACT—GERMANE AMENDMENT—PENAL PROVISIONS.—An amendment to a valid law need not more fully state the subject of the amended statute than it is stated in the valid statute amended. The title of the act of March 22, 1905, entitled, "An act to amend 'An act to protect stockholders and persons dealing with corporations in this state,' approved March 20, 1878," sufficiently expresses the subject matter of the amendment notwithstanding the body of the act as amended is wholly penal in its provisions.

ID.—CONSTITUTIONALITY OF AMENDATORY ACT.—Though, if the amendatory act of 1905 would, if passed as a new act, be invalid under the present constitution, yet it is nevertheless valid, since the original act of 1878 was valid under the former constitution, and since the amendatory act recites the original valid act, of which it is amendatory, and re-enacts the act as amended in full. This is a sufficient compliance with the constitution, both as to the title of the amendatory act and as to the manner of amending the original act.

ID.—CONVICTION OF CRIME CHARGED—FRAUDULENT PROSPECTUS OF OIL COMPANY—MOTION TO ARREST JUDGMENT PROPERLY DENIED.—Where the crime charged under the amended act was the publication by the defendant as secretary and manager of an incorporated oil company of a willfully false and exaggerated report, prospectus, account and statement of the operations, values, business and expenditures, and prospects of said oil company, with the intent to defraud the public and persons generally, the information therefor is sufficient, and after a verdict of guilty, upon sufficient evidence, a motion in arrest of judgment was properly denied.

ID.—EVIDENCE—ADMISSION OF ENTIRE PROSPECTUS—APPEAL TO PUBLIC TO TAKE STOCK—FALSITY—FRAUDULENT INTENT.—Where the pub-

lished prospectus is set forth in full in the information, and the intent to defraud was charged in accordance with the statute, and in its intent it was well calculated to induce persons who might read it to purchase stock in the company, and was an appeal to the public to purchase stock therein, it was properly admitted in evidence as a whole, which, when taken in connection with evidence of the falsity of the matters therein alleged to be untrue, tended to show that the false portions thereof were published with intent to defraud the public, and persons who might be induced thereby to invest in the stock of the company.

ID.—CLAIM OF OIL LAND—PROOF OF FALSITY—PRIOR AFFIDAVITS AS TO GRAZING PURPOSES—APPLICATIONS FROM STATE.—Where the prospectus stated that "this land is made up of more certain indications of oil than any other field in the state," evidence is admissible as tending to show the falsity of that statement that, prior to the prospectus, applications were made to purchase lands from the state, included therein, in connection with which defendant swore that the lands were principally adapted to grazing purposes; and the applications were admissible as part of the *res gestae* of the making of the affidavits, in order to show that the affidavits were statements of material matters made upon an oath authorized as required by law.

ID.—CROSS-EXAMINATION OF DEFENDANT—MATTERS NOT TESTIFIED TO IN CHIEF—ERROR WITHOUT PREJUDICE.—Upon cross-examination of the defendant as to matters not testified to in chief,—concerning prior mineral locations which were fragmentary evidence, having no effect on the case; and concerning additional development work, which could only be of service to the defendant; and concerning his signature to an affidavit of grazing lands which had been fully proved in the case; and concerning a corrected letter admitted on cross-examination which was an immaterial substitute for the original admitted in chief,—there was no prejudicial error as to any of such matters.

ID.—EFFECT OF AMENDMENT TO CONSTITUTION REQUIRING SUBSTANTIAL INJURY TO APPEAR FROM ERROR.—The recent amendment to the constitution, known as section 42 of article VI of the constitution, providing that no judgment shall be set aside or new trial granted in a criminal case for any error, "unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," requires at least that it must appear to the court affirmatively that the defendant has been injured in a substantial manner by the error complained of.

ID.—INJURY NOT PRESUMED FROM ERROR.—Under the amendment there can be no presumption of injury from the mere fact of error but substantial injury as well as the error must be made affirmatively to appear.

ID.—REQUESTED INSTRUCTION AS TO AFFIDAVITS FOR GRAZING PURPOSES—RIGHT TO PUBLISH PROSPECTUS AS TO OIL—REQUEST PROPERLY MODIFIED.—A requested instruction as to the effect of defendant's affidavits for grazing purposes, which concluded with the following sentence: "If the defendant did in fact believe that there was oil and oil formations in said land, but there had been no mineral discovery actually made thereon, he, notwithstanding such belief, had a legal right to make an affidavit that such land was principally adapted for grazing purposes, yet, under such circumstances, he would have a legal right to subscribe, verify and publish a prospectus containing the statement that such lands contained oil and formations including oil," was properly modified by striking out such sentence, as misleading, in reference to the contents of the prospectus, and as argumentative and trenching upon the province of the jury.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

A. L. Frick, and W. J. Clark, for Appellant.

U. S. Webb, Attorney General, Chas. Jones, Deputy Attorney General, and Raymond Benjamin, Deputy Attorney General, for Respondent.

HALL, J.—This is an appeal from a judgment and order denying defendant's motion for a new trial. Defendant also, in form, took an appeal from the order of the court denying his motion in arrest of judgment. Such order is not appealable (Pen. Code, sec. 1237), but may be reviewed upon the appeal from the judgment.

The defendant was charged with violating the provisions of an act of the legislature of this state, approved March 22, 1905, entitled "An act to amend an act entitled 'An act to protect stockholders and persons dealing with corporations in this state,' approved March 29, 1878, and all acts amendatory thereof, and to repeal all acts in conflict therewith."

The act (of 1905) consists of two sections as follows:

"Section 1. Any superintendent, director, secretary, manager, agent or other officer, of any corporation formed or existing under the laws of this state, or transacting business in

the same, and any person pretending or holding himself out as such superintendent, director, secretary, manager or other officer, who shall willfully subscribe, sign, indorse, verify, or otherwise assent to the publication, either generally or privately, to the stockholders or other persons dealing with such corporation, or its stock, any untrue or willfully and fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures or prospects, or other paper or document intended to produce or give, or having a tendency to produce or give, to the shares of stock in such corporation a greater or less apparent or market value than they really possess, or with the intention of defrauding any particular person or persons, or the public, or persons generally, shall be deemed guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state prison or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both.

"Section 2. All acts and parts of acts in conflict with this act are hereby repealed."

It is claimed that the statute is void in that the subject thereof is not sufficiently indicated in the title (Const., sec. 24, art. IV) in that the body of the act is wholly penal in its provisions, which it is urged are not germane to the subject of protecting stockholders and persons dealing with corporations.

If the statute is invalid for the reason assigned, the information drawn under the same states no offense, and the court should have granted the motion in arrest of judgment.

We do not think that the statute is invalid for the reason suggested or for any other.

The objection made to the title of the act is really directed to the title of the original act of 1878 [Stats. 1877-78, p. 695]. When this act was enacted the provision of our then constitution relating to the title of acts of the legislature was held to be directory only. In other words, whether or not the act of 1878, if enacted now, would be invalid because of insufficiency of its title to express the subject, it was valid when adopted, and remained a valid law until amended in 1905. The title of the amendatory act of 1905 recites the title of the act of which it is amendatory, and re-enacts the act as amended in full. This is a sufficient compliance with

the constitution, both as to the title of the amendatory act and as to the manner of amending the original act.

In *People v. Parvin*, 74 Cal. 549, [16 Pac. 490], the validity of an act entitled, "An act to amend section 3481 of the Political Code," was attacked for the reason that the title of the act did not indicate the subject thereof. It was there held that in the case of an amendment to a valid law it was not necessary to more fully state the subject of the amendatory act than it is stated in the valid statute amended. The court in this regard said: "If it be said that the title of the amendatory act of April 15, 1880, does not express the subject, the reply is that the constitution does not require, in case of an amendment, that the subject shall be any more fully stated than it is stated in the *valid statute* amended."

This case upon this point has been cited and approved in *Francais v. Soms*, 92 Cal. 505, [28 Pac. 592]; *Beach v. Von Detten*, 139 Cal. 462, [73 Pac. 187]; *People v. Oates*, 142 Cal. 12, [75 Pac. 337]. It is decisive of the point raised as to the validity of the act now in question.

Furthermore, we think that an act that provides for the punishment as a crime of enumerated acts that may result in deceiving to their injury stockholders and others dealing with the corporation, comes within the general scope of the title, "An act to protect stockholders and persons dealing with corporations in this state."

In this respect the sufficiency of the title is fully supported by the case of *Gieseke v. County of San Joaquin*, 109 Cal. 489, [42 Pac. 446]; see, also, *Ex parte Kohler*, 74 Cal. 38, [15 Pac. 436].

The act is not invalid for any defect in its title and the court did not err in denying appellant's motion in arrest of judgment.

We now come to the consideration of alleged errors claimed to have been committed by the court during the trial.

The defendant was charged with having, on or about November 4, 1910, as secretary and manager of the Haiwee Pacific Oil Company, a corporation, with the intention of defrauding the public and persons generally, willfully subscribed, indorsed, verified and assented to the publication of a certain untrue and willfully exaggerated report, prospectus, account

and statement of the operations, values, business, profits, expenditures and prospects of said Haiwee Pacific Oil Company.

The prospectus is set forth in full in the information, and, among other things, it contains the following statements: "Five years ago we acquired 2,560 acres of land in Owens Valley, Inyo county, California. We have since added to our holdings until we now own 6,080 acres located about ten miles south of Owens Lake."

"This land is made up of more certain indications of oil than any other field in California, comprising geological formations such as shale, gypsum, conglomerate formations, chalk, lime, magnesia, sulphur, fossils and dark green oil sand."

"We struck oil in well No. 1 at a depth of 1,503 feet."

By apt and appropriate language the statements above set forth are alleged to be false and untrue.

No point is made that the verdict is not supported by the evidence. Appellant relies for a reversal upon alleged errors committed during the trial.

The court, over the objection of defendant, allowed the entire prospectus to be introduced in evidence, and this action of the court is claimed by defendant to be error. We do not think so. In accordance with the statute it was charged that the false prospectus was published with intent to defraud the public and persons generally. The prospectus is set forth in full in the information, and covers eleven pages of the record, and contains many statements that are not alleged to be false. But in its intent it was well calculated to induce persons who might read it to purchase stock in the company. In attractive form it presented to the reader the advantages and large profits to be realized by investors in the stock of such a company as this was represented to be. The entire prospectus was an appeal to the public to purchase stock in this company. It was thus clearly evidence which, taken in connection with evidence of the falsity of the matters contained therein alleged to be untrue, tended to show that the false portions thereof were published with intent to defraud the public and persons who might be induced thereby to invest in the stock of the company.

Complaint is made of the action of the court in permitting the prosecution to introduce in evidence certain applications

made by two witnesses to purchase from the state portions of the land described in the prospectus as belonging to said company, and in connection therewith affidavits made by defendant to the effect that the lands described in the applications were principally adapted to grazing purposes. These affidavits were made by defendant prior to the publication of the prospectus, and tended to prove knowledge on the part of defendant that the statement in the prospectus as to the indications of the land containing oil was not true. It was stated in the prospectus that "This land is made up of more certain indications of oil than any other field in California." It is improbable that this could be true if the land was principally adapted to grazing purposes.

The rule laid down in *Miller v. Chrisman*, 140 Cal. 446, [98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444], to the effect that title to land located as oil land is not perfected until discovery of oil in paying quantities is actually made, does not affect the question as to the evidential character of the affidavits in question. The statement in the affidavits that the land was principally adapted to grazing purposes was either false or true. If true, it tended to contradict a vital statement published by defendant in the prospectus.

The affidavits being admissible in evidence, we think it follows that the applications in support of which they were made were also admissible. The applications were part of the *res gestae* of the making of the affidavits. They gave character to the affidavits, and showed that they were not idle and vain things, but were made deliberately in support of a claim of legal right. The applications showed that the matters stated by defendant in the affidavits were not founded upon an extrajudicial oath, but were statements of material matters made upon an oath authorized and required by law.

It cannot be doubted that any statement made by defendant contradictory of the statement made by him in the prospectus would be admissible as evidence against him upon this charge. If, perchance, such statement had been made under oath in a judicial proceeding, such fact would likewise be admissible in evidence. The same principle is applicable to the affidavits and applications to purchase land. The court therefore did not err in admitting the evidence in question.

It is next urged that the court, over the objection of defendant, compelled him to answer questions upon cross-examination concerning matters about which he had not been examined in chief, and that he was thus compelled to be a witness against himself, in violation of section 13 of article I of the constitution.

In this connection we have been favored by very able arguments by counsel for both appellant and respondent as to the meaning and effect of the recently adopted amendment to the constitution designated as section 4½ of article VI, [Stats. 1911, p. 1798], and which is as follows:

"No judgment shall be set aside or new trial granted in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

That amendment certainly requires at least that it appear to the court affirmatively that defendant has been injured in a substantial manner by the error complained of. Under the amendment to the constitution in question no presumption of injury can arise from the mere fact of error. Substantial injury as well as the error must be made affirmatively to appear. The amendment certainly goes this far.

And construing it as requiring an affirmative showing both of error and substantial injury resulting therefrom, we do not think the matters complained of as to the rulings on cross-examination would justify a reversal of the judgment or order denying the motion for a new trial.

It was stated in the prospectus that the Haiwee Pacific Oil Company owned 6,080 acres of land located about ten miles south of Owens Lake.

It was admitted that the title to all this land remained in the United States government.

In order to justify the statement in the prospectus that the company owned 6,080 acres of said land, the defendant upon direct examination gave evidence of the making of various locations under the mineral land laws of the United States. Some of these locations were made in 1907 and some in 1909, but all had been made more than one year prior to the pub-

lication of the prospectus. Defendant also gave testimony as to the doing of certain development work, consisting of the sinking of wells 1 and 2 upon two certain locations. The various locators had conveyed whatever rights they had acquired under the locations testified to by defendant to the said company.

Upon cross-examination, over proper objections of defendant, he was compelled to testify that in 1905 he and some associates had made locations upon some of the same land located in 1909. He had not been questioned in chief as to any such locations, and the questions in relation thereto were probably not proper cross-examination. But the matter as to these prior locations was pursued no further than to show the fact that he had made such locations. This was but a bit of isolated, fragmentary evidence that could not have had any effect upon the case. Unless these prior locations had been followed by development work within the year, all rights thereunder failed at the expiration of the first year. (*Miller v. Chrisman*, 140 Cal. 440, [98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444].) No evidence of any such work was given, and the claims were therefore open to subsequent location. (*Miller v. Chrisman*, 140 Cal. 440, [98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444].) The evidence as to the prior locations was in no way discreditable to defendant, and was as to such an utterly immaterial and harmless matter that defendant could not have been injured thereby.

The only development work testified to in chief by defendant was as to the sinking of the two wells. Upon cross-examination he was asked if any other development work had been done, and upon objection being made and overruled, he testified that some other development work had been done upon some of the locations consisting of the sinking or digging of pits in the earth.

It is impossible for us to see how defendant could have been injured by this evidence. It was important for defendant to show the doing of as much work upon the various claims as possible. Any given piece of work can protect no more than one claim, which cannot in any case exceed 160 acres. (*Miller v. Chrisman*, 140 Cal. 440, [98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444].) The evidence as to the sinking of the two wells tended to show some justification for a claim of owner-

ship in not more than two claims of 160 acres each. The evidence brought out by the challenged cross-examination, as to the doing of other work, was favorable to defendant, for it showed some additional effort on the part of the company to perfect its claim to the land. This was important in view of the admission that title to all the land was in the United States. It is urged that the effect of the evidence as to the doing of this additional work was to show the limit of such work, which was wholly inadequate to protect the claim of the company to any considerable portion of the land referred to in the prospectus. In answer to this it must be said, we think, that in the absence of evidence of this additional work it would have been inevitably assumed from the evidence then before the court that the only work done in protection of the various locations was that relating to the sinking of the two wells.

It is clear, we think, that defendant could not have been injured by the evidence which he gave over objection as to the additional work.

Over the objection of defendant he was compelled to testify that he made a certain affidavit, about which he had not been examined in chief. But this affidavit had already been introduced in evidence, and it had been shown beyond controversy that it had been made by defendant. It was one of the affidavits in which he made oath that the land therein referred to was principally adapted to grazing purposes. It is impossible to see what additional force or effect could be given to the affidavit by defendant's statement that he made it, which was a fact already established beyond controversy. The defendant was therefore not injured by the ruling of the court in overruling his objection to the question.

Defendant also complains of the action of the court in overruling his objection to the introduction as part of his cross-examination of a letter signed by one Youle. We think the introduction of this letter and the question asked in relation thereto were proper cross-examination.

Defendant had testified that a certain letter, written and signed by said Youle, had been given him by Youle. It was introduced in evidence. Youle had knowledge and some experience as to oil lands, and this letter was commendatory of the oil prospects on the lands referred to in the prospectus.

The cross-examination developed that immediately after signing said letter Youle stated to defendant that he wished to make some corrections therein, and at once dictated to defendant such letter as corrected. Defendant took it down in typewriting and Youle at once signed it. It was thus a part of the *res gestae* of the original letter, and was intended as a substitute therefor. Both letters were commendatory of the lands as probably oil-bearing, and were substantially to the same effect. The difference in their contents is quite insignificant. The court did not err in its ruling admitting in evidence the letter as thus corrected.

This disposes of all the points made as to the cross-examination of defendant.

Complaint is also made that the district attorney was guilty of misconduct. It is sufficient upon this point to say that we have examined the matters called to our attention in this connection, but find nothing that would justify a new trial or that merits any detailed discussion of the point.

Complaint is also made that the court refused to give an instruction requested by defendant as to the presumption of innocence that attends a person on trial for crime. We think, however, the subject was sufficiently covered in instructions that were given by the court.

The defendant requested an instruction as to the purpose for which certain affidavits in evidence, and made by defendant, might be considered. These affidavits contained the statement that the lands referred to therein were principally adapted for grazing purposes. The court gave the instruction as requested, save that it struck out the concluding sentence thereof, which was as follows: "If the defendant did in fact believe that there was oil and oil formations in said land, but there had been no mineral discovery actually made thereon, he, notwithstanding such belief, had a legal right to make an affidavit that such land was principally adapted to grazing purposes, yet under such circumstances he would have a legal right to subscribe, verify and publish a prospectus containing the statement that such lands contained oil and formations indicating oil."

We do not think that the court erred in striking out the above sentence. This instruction makes the right to make the statement of fact as to the purpose for which the land

was principally adapted depend upon whether or not any mineral discovery had been actually made thereon. The right to make the particular statement depended upon whether or not it was true or defendant in good faith believed it to be true. The concluding portion of the sentence is misleading and confusing, as indicating that the prosecution was in part at least founded upon a statement in the prospectus simply to the effect that the lands contained oil and formations indicating oil. The statement complained of went much further than this. It was that "this land is made up of more certain indications of oil than any other field in California." The portion of the requested instruction stricken out was argumentative, and trenched upon the right of the jury to determine all questions of fact.

The court did not err in refusing the rejected portion of the instruction.

We have considered and disposed of all points urged for a reversal.

The judgment and order are affirmed.

Kerrigan, J., and Lennon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 22, 1912, and the following opinion then rendered thereon:

THE COURT.—The petition for rehearing is denied.

We do not think the case, as stated in the opinion of the district court of appeal, required any discussion or statement of the effect of the recently adopted section 4½ of article VI of the constitution. The errors complained of, as stated by that court in its opinion, were not of a character to work substantial injury, and they would not have required a reversal under section 1258 of the Penal Code nor under the rules of this court established long prior to the adoption of said section of the constitution. We express no opinion as to that part of the opinion referring to said amendment.

[Crim. Nos. 171, 172. Third Appellate District.—January 22, 1912.]

THE PEOPLE, Respondent, v. CELESTINO MARIO, Appellant—No. 171. THE PEOPLE, Respondent, v. GUISEPPE MARIO, Appellant—No. 172.

CRIMINAL LAW—APPEAL—FAILURE OF APPELLANT TO FILE BRIEF—DISMISSAL.—Where the appellant in a criminal case fails to file a brief or any points and authorities as required by rule 4 of the supreme court, the appeal must be dismissed under rule 5 of that court.

ID.—REASON FOR RULE AS TO DISMISSAL.—The reason of the rule requiring a dismissal in such case is that the appeal presupposes a debatable ground therefor, and it is the duty of the appellant to point out the specific points upon which he seeks to support his appeal; and it is not contemplated that the reviewing court, unaided by the appellant, shall make an independent investigation to ascertain whether he has been legally convicted.

ID.—ROBBERY—SUPPORT OF VERDICTS—CORRECT CHARGE.—Though not required to examine the record, it is held from a careful inspection thereof that the verdict of conviction for robbery against each of the appellants is sustained by the evidence, and that the instructions in both cases fully, fairly, clearly and correctly covered every phase of each case, as disclosed by the charge and the evidence.

APPEALS from judgments of the Superior Court of Plumas County upon separate trials. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

W. W. Kellogg, and J. D. McLaughlin, for Appellants.

U. S. Webb, Attorney General, and J. Charles Jones, Deputy Attorney General, for Respondent.

HART, J.—The defendants above named were jointly charged, by information, filed by the district attorney of Plumas county, with the crime of robbery. They were given separate trials, and each was convicted of the crime charged in the information.

Each of the defendants appeals from the judgment under the method prescribed by section 1247 of the Penal Code, and, as one of the grounds of the appeal in each cause is

the alleged insufficiency of the evidence to justify the verdict, the court below ordered, upon the application of the defendants, all the testimony in each case to be transcribed by the phonographic reporter, and said testimony, therefore, constitutes a part of the record on appeal in each case.

But counsel for the appellants have not filed a brief or points and authorities in either case. The transcript in each case was filed in this court on October 28, 1911. Rule IV [160 Cal. xliii, 119 Pac. x] of the supreme court provides that, "in criminal cases, the appellant shall file his points and authorities (with proof of service of a copy thereof on the attorney general) within ten days after the filing of the transcript," and rule V [160 Cal. xlvi, 119 Pac. x] authorizes a dismissal of the appeal where the points and authorities are not so filed. The reason of the last-mentioned rule is that, since an appeal presupposes at least some debatable ground of complaint against the judgment and the manner of its procurement, it is the duty of the complaining party (the appellant) to point out the specific points upon which he seeks to support his appeal, and that it is not intended or contemplated that the reviewing court, unaided by appellant himself, shall make an independent investigation for the purpose of ascertaining whether he has been legally or illegally convicted of the offense charged against him. As is said in *People v. Perry*, 16 Cal. App. 771, [117 Pac. 1036], where the appellant likewise failed to file points and authorities, "this court is not required, in the absence of special assignments, in some form, of alleged error, to search the record for the purpose of determining whether the trial in the court below was in all respects conducted without prejudice to the substantial rights of the accused."

We have, however, notwithstanding the omission to file briefs in these cases, carefully read the testimony and examined the instructions in each case. The principal testimony upon which the verdicts are founded came from the prosecuting witness. It involves a direct statement that the defendants went to the room of the prosecuting witness shortly after the latter had retired for the night and, while one held a pistol over him, the other abstracted the sum of ninety dollars in gold from a pocket in the shirt in which he retired and which was on his body at the time of the robbery. This

testimony is sufficient to support the verdict returned in each of the cases.

The instructions given in both cases fully, fairly, clearly and correctly covered every phase of each case as disclosed by the charge and the evidence.

For the reasons stated in the foregoing the appeal in both cases will have to be dismissed.

It is therefore ordered that the appeal in the case of *People v. Mario* (No. 171) be dismissed, and that the appeal in the case of *People v. Mario* (No. 172) be dismissed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 158. Third Appellate District.—January 26, 1912.]

THE PEOPLE, Respondent, v. W. P. BURKE, Appellant.

CRIMINAL LAW—EXPLOSION OF DYNAMITE AT DWELLING—PROVINCE OF JURY—SUPPORT OF VERDICT.—Where the defendant was charged with the offense of the explosion of dynamite at a dwelling with intent to injure and kill an inmate, and was convicted thereof, the jury is the sole judge of all questions of fact, and its finding based upon evidence upon any controverted question is conclusive on this court. It is held, upon a statement of the evidence, that it is not only sufficient to support the verdict, but that it is persuasive, satisfactory and convincing as to the guilt of the defendant.

Id.—SUFFICIENCY OF INDICTMENT FOR EXPLOSION OF DYNAMITE AT DWELLING.—An indictment under section 601 of the Penal Code, charging that defendant, on a specified date and in a specified county, "did willfully, unlawfully, feloniously and maliciously deposit and explode at, in and near a dwelling-house, being a tent-house and place where human beings did then and there and theretofore usually inhabit, assemble and frequent, pass and repass, dynamite, Hercules powder, and other chemical compounds and explosives, with the intent then and there to injure Lu Smith, a human being, and that by means of said deposit and exploding of said explosives, said Lu Smith was thereby injured and endangered," sufficiently states the offense, and meets all of the requirements of the Penal Code, and a demurrer thereto was properly overruled.

Id.—LOCATION OF TENT-HOUSE—IDENTIFICATION OF CRIME—PROTECTION FROM FURTHER PROSECUTION—PROOF OF PARTICULARS.—Though the location of the tent-house might have been more definitely stated,

yet, in so far as locality is concerned, it was sufficient under the indictment to aver that the offense was committed in the county. This, in connection with the name of the person injured, and the substantive averments of the crime, makes the identification thereof complete, which not only answers every purpose of good pleading, but would also protect the defendant from any future prosecution for the same offense, at the time set forth, at any place within the jurisdiction of the superior court of the county, upon which, under a plea of "once in jeopardy," defendant may show the particulars of the former offense to identify the same by extraneous evidence.

EVIDENCE—GOOD REPUTATION OF DEFENDANT FOR PEACE AND CHASTITY—PROPER CROSS-EXAMINATION—HEARING OF CONTRARY PARTICULARS.—Witnesses offered to show the good reputation of the defendant for peace and chastity were properly asked by the district attorney on cross-examination if they had not heard that the defendant, as a physician, had made a practice of committing abortions, and as to his having improper intercourse with women, and taking undue liberties with female patients. Such questions were properly permitted by the court, as affecting the weight of the testimony as to defendant's reputation.

ID.—RULE AS TO SCOPE OF CROSS-EXAMINATION OF CHARACTER WITNESSES.—The rule is that on cross-examination of character witnesses, they may be asked as to specific reports concerning the trait of character involved, if they have a tendency to establish the bad reputation, although they may not be sufficient for that purpose.

ID.—QUESTION DISALLOWED—INDICTMENT OF DEFENDANT IN ANOTHER COUNTY—MISCONDUCT NOT ESTABLISHED—PRESUMPTION UPON APPEAL.—The fact that the court disallowed a question asked by the district attorney of a character witness for defendant whether he had not heard that the defendant was indicted in another county does not establish misconduct of the district attorney in asking it, in the absence of any showing that he asked it in bad faith. It must be presumed upon appeal that the district attorney was conscientiously discharging his duty as he understood it.

ID.—LIMITING NUMBER OF CHARACTER WITNESSES—DISCRETION NOT ABUSED.—It is held that the court did not abuse its discretion in limiting the number of character witnesses to thirteen, when no evidence was offered by the prosecution to impeach that reputation. There must necessarily be a limit to such inquiries, and it is for the court to prescribe it in such manner that it is not likely that any additional witnesses would add weight to the large number of unimpeached and uncontradicted witnesses introduced.

ID.—DATE OF ILlicit RELATIONS BETWEEN PROSECUTRIX AND DEFENDANT—IMPEACHMENT ON CROSS-EXAMINATION—EXPLANATION ON REDIRECT EXAMINATION.—Where the prosecutrix had stated on direct

examination that her sexual intercourse with defendant began at Oakland in June, 1906, and she was impeached on cross-examination by her evidence before the grand jury that in April, 1906, defendant, at his sanitarium, "did things that no physician should do with a patient," she was properly allowed on redirect examination to answer the question, "What were these things?" by way of explanation, and to state facts and circumstances tending to correct or repel any wrong impressions or inferences arising from the matter drawn out on cross-examination, though defendant's case may be prejudiced thereby.

ID.—EXPRESSED MOTIVE IN PROCURING DYNAMITE FROM MINE—PROPER EVIDENCE—PRIOR SELF-SERVING DECLARATIONS—HEARSAY.—The statement made by the defendant at the time when he procured the dynamite from a mine in Butte county, which was subsequently exploded at the tent of the prosecutrix, as to his then expressed purpose and motive in procuring it, it was admissible, as calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction. But prior self-serving declarations to third persons made several days before the visit to the mine, which were no part of the *res gestae*, were properly excluded as inadmissible hearsay.

ID.—INDUCEMENT TO PROSECUTRIX TO LEAVE STATE—PAYMENT BY AGENT FOR DEFENDANT—CIRCUMSTANTIAL PROOF—QUESTION FOR JURY—ADMONITION.—The court properly admitted evidence that a woman named, who had no money of her own, paid \$750 to the prosecutrix to leave the state before the trial of the defendant, and it is held that all of the circumstances proved warranted the reasonable inference that she was the agent of the defendant in inducing such departure from the state, and that the court properly submitted the whole of the evidence to the jury, with the admonition, "Unless you are satisfied from all the evidence in the case that the defendant did cause or authorize the persuasion or disappearance of such witness, you cannot consider it as a circumstance against the defendant."

ID.—PROPER EVIDENCE OF WITNESS ACQUAINTED WITH WOMAN.—The evidence of a witness acquainted with such woman for several years, and who had opportunity to know the facts, was properly admitted to show her movements and financial condition, which were material and relevant matters. In weighing such testimony, the court or jury should consider the means of knowledge of the witness, and all facts tending to illustrate his credibility and the weight of his testimony.

ID.—CONSPIRACY—CIRCUMSTANTIAL EVIDENCE—INFERENCE OF JURY.—In proving a conspiracy, it need not be shown that the parties actually came together and agreed to enter into and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually

must be, inferred by the jury from proof of the facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole.

- ID.—ILLICIT RELATIONS OF PROSECUTRIX WITH OTHER PERSONS—PARENTAGE OF CHILD.**—Where a child was shown to have been born from the prosecutrix, which she testified was the result of her illicit relations with defendant, who as a physician attended its birth, the court properly confined questions as to her illicit relations with other men to a period of time bearing solely upon the question of the parentage of the child, as to which there was no contrary evidence. She could not be impeached by evidence of prior particular wrongful acts, not bearing upon such parentage nor questioned in relation thereto.
- ID.—CLAIM BY DEFENDANT OF POSSESSION OF ORIGINAL DYNAMITE—REBUTTAL—EVIDENCE OF SUBSTITUTION.**—Where the defendant claimed to have kept the original dynamite purchased at the mine and to have it on the premises, it is held that there was sufficient proof in rebuttal that the dynamite upon the premises was purchased since the explosion of the other dynamite at the tent of the prosecutrix, and was substituted therefor, and that such substitute was procured by an agent of the defendant acting in his behalf.
- ID.—PROPER EXHIBITION OF CHILD IN COURT BY PROSECUTRIX—PROVINCE OF JURY—QUESTION OF SIMILARITY TO DEFENDANT.**—The prosecutrix had the right to bring her child with her into court, and to have it in her arms when testifying to its paternity by the defendant. In view of the question as to its paternity, it was proper to submit the child to the inspection of the jury, who were the judges as to whether or not it resembled the defendant, and unless such resemblance existed, its production in court would be in the defendant's favor.
- ID.—EVIDENCE—GENEROUS DISPOSITION OF DEFENDANT.**—The court did not err in rejecting evidence as to the generous disposition of the defendant. Such incidental and remote traits of character are not involved in the proper evidence of character.
- ID.—MENTAL CONDITION OF PROSECUTRIX—INQUIRY NOT RESTRICTED.**—It is held that the superior court did not improperly restrict the cross-examination of the prosecutrix as to her mental condition, and that there was no restriction or denial of the defendant's right to the broadest inquiry of witnesses as to her sanity.
- ID.—EVIDENCE OF OTHER OFFENSES—CONNECTION WITH OFFENSE CHARGED.**—Whenever there is a clear and logical connection between two or more offenses and the offense charged, either as bearing upon the motive for that offense or as indicating the guilt of the defendant in committing the same, the evidence of such other offenses is admissible against the defendant.

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- Id.—OFFENSES INDICATING MOTIVE.**—Evidence of the illicit relations between the defendant and the prosecutrix and the parentage of the child were clearly admissible as bearing upon the motive of the defendant to commit the offense charged.
- Id.—OFFENSES INDICATING CONSCIOUSNESS OF GUILT OF OFFENSE CHARGED.**—The offenses of subornation of perjury, and the preparation of false and substitute evidence to indicate the continuous possession of the dynamite which was exploded at the tent of the prosecutrix, and of inducing the prosecutrix to leave the state, and of defendant's attempt to poison her after the commission of the offense charged, all indicate the defendant's consciousness of his guilt of that offense.
- Id.—WRITTEN STATEMENT OF PROSECUTRIX FOR USE ON CROSS-EXAMINATION—ERROR NOT APPEARING.**—No prejudicial error appears in the action of the court in declining to order the district attorney to deliver to defendant's counsel a written statement of the prosecutrix prepared to be used on the district attorney's cross-examination of the sheriff, when the sheriff was not asked concerning it, and it does not appear that he had seen it, nor was it demanded on the examination of the prosecutrix, and where, without reference to whether it could be used on cross-examination or not, its contents do not appear in the record on appeal.
- Id.—FOUNDATION NOT LAID FOR IMPEACHMENT.**—Where a document, in so far as it appears material, could only be used on cross-examination to impeach the witness, but no foundation was laid for such impeachment, he cannot complain of the court's action in that regard.
- Id.—DEFENSE OF ALIBI—PROPER EVIDENCE NOT RESTRICTED—OPINION—DECLARATIONS NOT PART OF RES GESTAE.**—It is held that the court did not restrict any proper evidence offered in support of the defense of alibi of the defendant when the explosion took place, but it properly sustained an objection to certain questions calling for the opinion or conclusion of the witness, and also properly excluded his declarations which were not part of the *res gestae* of the explosion which caused the injury, but were made at a different time and place, which could in no way be considered a part of the transaction.
- Id.—EXPERT EVIDENCE—MOST PRACTICAL WAY TO REMOVE ROCKS—QUESTION FOR JURY.**—A witness qualified as a mining engineer was properly held not thereby entitled to state from his experience "what would be the most practical way to remove those rocks" from defendant's ground, for the reason that this was not the subject of expert testimony, but was a matter for the jury to determine from evidence explaining the situation as to the rocks.
- Id.—SECRECY OF DEFENDANT IN OBTAINING DYNAMITE FROM MINE—PROVINCE OF JURY.**—It is held that a question as to whether there

was "any secrecy" about the defendant's "statements or movements or his actions in connection with the getting of the powder," which was obtained from the mine, called for an inference or conclusion within the exclusive province of the jury.

ID.—REQUEST NOT TO TELL "AT ANY TIME."—It is held that a question as to whether defendant said anything at the mine "at any time while he was there, asking you not to tell about giving the powder," would not be admissible. The question should have been limited to the time when defendant procured the dynamite.

ID.—ARGUMENT OF DISTRICT ATTORNEY—WIDE RANGE TO BE ALLOWED.—

In the argument of the district attorney before the jury, the range of discussion, illustration and argument is properly very wide. Matters of common knowledge and historical facts may be referred to and interwoven in such argument; and allusion may be made to the prevalence of crime and the duty of the jury. He may express his belief as to the guilt of the defendant, and that the facts are sufficient to convince anyone of his guilt.

ID.—ALLUSION IN ARGUMENT TO PEOPLE OF STATE—ABSENCE OF PREJU-

DICE—CORRECTION BY COURT.—Where the district attorney alluded in his argument to a law that is "equal for the rich and the poor," the proper administration of which "will enjoy the confidence and deserve the reverence of the people of our state," and then stated: "To-night the people of the state look here to you. They are not looking here to find out whether or not the defendant is guilty. They have conceded that he is. They are looking here to find out if a court of justice is to declare him so,"—it is held that if such remarks be considered improper, it must be presumed that any injurious effect was forestalled or removed by the ruling of the court that "that statement as to what the people or other persons think about it is to be disregarded by the jury."

ID.—PROPER INSTRUCTION—GUILT BASED UPON PERSONAL ACT, OR UPON

BEING ACCESSORY.—The court properly instructed the jury that "if you are satisfied from the evidence beyond a reasonable doubt and to a moral certainty that the crime charged in the indictment was directed by the defendant, it would be your duty to find him guilty. So, too, if you should be likewise satisfied from the evidence in the case that the explosive was deposited and exploded by some other person whose identity is unknown, and you should also be satisfied from the evidence beyond a reasonable doubt that the defendant was concerned in the commission of such crime as above explained, but that he did not directly commit the act constituting the offense, but aided and abetted in its commission, or not being present, advised and encouraged its commission, you should likewise return a verdict of guilty."

ID.—DISTRICT ATTORNEY NOT REQUIRED TO ELECT—PROPER INDICTMENT AS PRINCIPAL—PROOF OF EITHER RELATION.—The district attorney

is not required to elect whether he will prosecute or ask for a conviction upon the ground that the defendant is the principal or an accessory before the fact; but he may ask for a verdict if the evidence satisfies the jury under either alternative, if there is evidence that the crime was actually committed. Since the defendant can be charged in the indictment as principal, whether he actually committed the offense or was an accessory thereto before the fact, he can be justly convicted thereunder if the evidence shows that he acted in either relation.

ID.—ABSENCE OF ERROR IN INSTRUCTIONS OR TENABLE GROUND OF REVERSAL.—It is held that there was no error in the instructions of the court, and that there is no tenable ground for interfering with the verdict of the jury or with the judgment of the trial court.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

J. R. Leppo, W. F. Cowan, and J. A. Cooper, for Appellant.

U. S. Webb, Attorney General, J. Charles Jones, Deputy Attorney General, and Clarence F. Lea, District Attorney of Sonoma County, for Respondent.

BURNETT, J.—This case has many peculiar features, and it has excited wide public interest on account of the nature of the charge and the prominence of appellant. He is a physician of high standing in his profession, a man of affluence and of many friends, and, prior to the unfortunate occurrence which gave rise to his prosecution, he bore an enviable reputation in the community, not only for the qualities involved in the accusation but—so it is claimed—for prominence in the manifestation of those traits of character, generally, that distinguish the benevolent and upright citizen. The case was prosecuted and defended with great pertinacity and rare ability. The trial lasted for seven weeks and a mass of testimony was taken, which, in six volumes of over five hundred pages each, has been submitted to this court. The printed arguments filed herein comprise something like a thousand pages, in which every possible phase, seemingly, of the propositions of law involved in the record has been

forcibly and persuasively presented by distinguished counsel, who have certainly spared no effort to assist the court in the arduous task of reaching a just and legal determination of this appeal. It would be impossible, within reasonable limits, to discuss fully the various points made by appellant. Indeed, it seems hardly practicable or requisite to notice specifically all of the grounds of attack upon the judgment to which our attention has been invited. The author of an opinion should, of course, keep in mind the constitutional provision requiring an appellate court to give the reasons for its conclusion, and should have a due regard for the gravity of the offense and the possible bearing of the opinion as a precedent in the future. He should also be not unmindful of the valuable assistance of counsel, but, manifestly, he must follow his own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and as to the questions which are worthy of notice at all.

In view of much of the argument of appellant, it seems appropriate, at the outset, to declare that, in our attention to the question of the guilt of defendant or of the sufficiency of the evidence to establish any fact in issue, we have been guided by the familiar and oft-repeated principle so forcibly stated in *People v. Ruef*, 14 Cal. App. 583, [114 Pac. 57], by Judge Cooper, who was then the presiding justice of the first district court of appeal, as follows: "In the discussion of this question it must be borne in mind that we have the power only as a matter of law to say as to whether or not there is sufficient evidence, conceding every syllable of it to be true, to support the ultimate finding of the jury. The jury is the sole judge of all questions of fact, and its finding, based upon evidence, upon any controverted question is conclusive on this court. It has the right to believe or to disbelieve any witness, and draw all reasonable inferences from the facts proven." And, also, in *People v. Durrant*, 116 Cal. 200, [48 Pac. 79], where the supreme court, through Mr. Justice Henshaw, goes so far as to say that where a witness has absolutely discredited his own testimony "by swearing to opposite statements so that one or the other must be false, under our laws his testimony is not of necessity to be rejected," and the jury, while they are bound to look upon it with suspicion, may accept as true one or other of the contra-

dictory asseverations. "Thus," as it is said, "upon a review of the evidence by this tribunal we may not examine with minuteness claims that witnesses are discredited or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence." This exclusive function of the jury as to the determination of the facts is well known, of course, to all the profession, but it is surprising that in so many instances it seems necessary to remind even leaders of the bar of the existence of the rule and of its vital importance in the determination of cases on appeal.

Much space is devoted in appellant's brief to the maintenance of his contention that the indictment is fatally defective and that therefore his demurrer thereto should have been sustained. He even states that he has not the patience to discuss the proposition, and that it seems clear to him that "This court cannot, without setting aside all rules and precedents, and ignoring all learning and reverence for the law of our ancestors, hold this indictment sufficient, when it fails to state or describe in any manner the place where the explosion occurred." The offense is defined in section 601 of the Penal Code. Therein is penalized the use of explosives for certain enumerated purposes. The charging part of the indictment here, following substantially the language of said section describing the alleged offense, is as follows: "The said W. P. Burke, on or about the fifth day of February, A. D. 1910, at and in the county of Sonoma, State of California, did willfully, unlawfully, feloniously and maliciously deposit and explode at, in and near a dwelling-house, being a tent-house and place where human beings did then and there and theretofore usually inhabit, assemble and frequent, pass and repass, dynamite, Hercules powder and other chemical compounds and explosives with the intent then and there to feloniously injure Lu Smith, a human being, and that by means of said deposit and exploding of said explosive said Lu Smith was thereby injured and endangered." It cannot be disputed that the indictment charges an offense defined in said section of the Penal Code and that said offense is shown to be within the jurisdiction of the court. Neither can there be any doubt, as we view it, that the indictment meets the requirement of sections 950, 951 and 952 of the

Penal Code. The act is identified by these circumstances, as pointed out by respondent: 1. The date satisfies the demand of section 955 of the Penal Code; 2. The offense was committed in Sonoma county; 3. The explosion occurred near a dwelling-house, being a tent-house; 4. Said tent-house was occupied by human beings and it was a place where they assembled and passed and repassed; 5. Dynamite was the explosive used; 6. The act was maliciously done; 7. The intent of the defendant was then and there to feloniously injure one Lu Smith; and 8. By means of said explosive said Lu Smith was then and there injured.

The location of the tent-house might have been more definitely indicated, but it is clear that appellant has suffered no injury by the want of greater particularity in the averment. In this respect there would seem to be no difference in principle from other cases of personal injury or of felonious assault. In a charge of assault with a deadly weapon or with intent to commit murder, for instance, it is admitted that it is sufficient, so far as the locality is concerned, to aver that the offense was committed in the county. This, in connection with the name of the person sought to be injured and the substantive averments of the crime, makes the identification complete and answers every purpose of a good pleading. "The facts necessary to be set forth are provided in the statute, and whenever it is substantially followed, so as to put the prisoner upon fair notice of the offense charged and the time, place and circumstances necessary to constitute the crime, it will be sufficient." (*People v. Thompson*, 4 Cal. 240.) Looking at the matter in its practical aspect, it is manifest that no substantial right of the defendant was invaded or imperiled. He knew whether the offense charged was committed by him in any part of Sonoma county. This knowledge would enable him to prepare and present his defense. And, as far as any future prosecution is concerned, the indictment would protect him in his answer to any charge of the same offense committed at the time set forth at any place within the jurisdiction of said superior court. If there should be any doubt as to this, his plea "of once in jeopardy" could be supported by extraneous evidence to identify the particular offense for which he has been tried and thus he would be amply protected. In the light of the trial itself, it may be added, it is made per-

fectly clear that appellant was not embarrassed by the asserted infirmity in the indictment and that he need have no fear of another conviction under a different pleading for the same offense. The following authorities, cited by respondent, bear more or less upon the sufficiency of the indictment, and they lend support to the ruling of the trial court upon the demurrer: *People v. Avila*, 43 Cal. 199; *Ex parte Helbing*, 66 Cal. 215, [5 Pac. 103]; *People v. Platt*, 67 Cal. 23, [7 Pac. 1]; *People v. Sheldon*, 68 Cal. 435, [9 Pac. 457]; *People v. Anderson*, 80 Cal. 205, [22 Pac. 139]; *People v. Frigerio*, 107 Cal. 152, [40 Pac. 107]; *People v. Faust*, 113 Cal. 172, [45 Pac. 261]; *People v. Prather*, 120 Cal. 660, [53 Pac. 259]; *People v. Barnnovich*, 16 Cal. App. 427, [117 Pac. 572]; *State v. Snead*, 16 Lea (Tenn.), 450, [1 S. W. 282]; *State v. Shaw*, 35 Iowa, 575; *Spencer v. State*, 13 Ohio, 407; 2 Bishop's New Criminal Procedure, sec. 135.

The cases cited to the point by appellant are easily distinguished from the one at bar and we deem it unnecessary to notice all of them specifically. They mostly relate to injuries to property and some fact essential for identification was omitted. The two following citations, however, relate to personal injuries: In *People v. Perales*, 141 Cal. 581, [75 Pac. 171], the charge was of an assault by means likely to produce great bodily injury. The supreme court, through Mr. Justice Lorigan, held that a more particular statement of facts was necessary to charge the offense definitely and certainly since, under the statute, the terms used had no precise or technical meaning, and that it was not a case where the statute designates and specifies particular acts or means whereby the offense is committed. In *People v. Mahoney*, 145 Cal. 104, [78 Pac. 354], the indictment was for the presentation of a false and fraudulent claim, and it was held, in accordance with the well-established rule in relation to fraud, that the particular acts and facts which make the claim fraudulent should be averred. Here, as we have seen, the facts constituting the offense were alleged substantially in the language of the statute, those facts need no definition nor explanation, and the time and place were sufficiently designated.

Appellant has displayed no lack of ingenuity or of courage in his discussion of the question of the sufficiency of the evidence to support the finding of the jury. The method, how-

ever, adopted, according to which the evidence is considered piecemeal without regard to the cumulative and convincing effect of the inculpatory circumstances in the aggregate, is probably the only course that could be pursued with any plausibility or hope of success in a case like this. We do not propose to argue the probative value of the various circumstances upon which the people relied for a conviction. We think the mere statement of some of the important facts, which we must accept as established to the satisfaction of the jury, carries with it the conclusion that the verdict represents a rational inference from the evidence.

For many years appellant had been at the head of an institution known as Burke's Sanitarium, located about five miles from Santa Rosa, in Sonoma county. At the time of the offense he was of the age of sixty or thereabout and one Lu Smith of the age of forty. In 1901, being ill, she came to the sanitarium and she was given osteopathic treatment by appellant. Subsequently she accepted employment from him and so continued, with some intermission, till the spring of 1906. She then went away for a short time but returned in June and remained till the 1st of September. After that she resided at different places and frequently visited appellant at his office in Oakland or San Francisco. In the summer of 1906 appellant addressed to her a long communication on the subject of the proper relation of the sexes, with a request that she read and return to him. This communication was read to the jury on the request of the defense. His opinions therein advanced seem rather startling in view of appellant's reputation in the community. He declared that the "voluntary family" was to take the place of the old-fashioned family; that while a "natural marriage may not be legal, but legal is not as high an authority as the natural"; that the "noble woman" is the one who has the courage to live "nature's ways" no matter what the result and regardless of the popular standard of morals; that sex is not enjoyed to the full "until you have sublimized it to the fineness of the rapture of affinity"; that "such a ceremony is lawless, wordless and thoughtless," and that Nature says: "Be utterly passionate where there is affinity and then it will be pure." Miss Smith seems to have been duly impressed with the beauty and verity of these sentiments, as she and the doctor assumed illicit rela-

tions in June, 1906, and their meretricious conduct continued at intervals for a long time thereafter, the doctor supporting her in the meantime, and in June, 1908, while appellant was visiting her at the home of a Mrs. Macy in San Francisco, conception took place. After Miss Smith knew she was to become a mother she told the defendant and, after consultation, it was decided that she should go to the Burke Sanitarium. When she arrived there she was introduced as Mrs. Smith by appellant, and, according to his directions previously given, she so signed her name on the register. She had no money and appellant paid for her maintenance at the sanitarium for some time. On the 12th of March, 1909, a child was born to her, appellant being the attending physician. About the 1st of August, 1909, she moved into the tent-house where the explosion occurred, the tent being located near some cottages on a road running through the sanitarium grounds. The first disturbance between appellant and Lu Smith occurred some time in June, 1909, when she said to him, in the presence of others: "You have time to see everybody else except your own child." This was the first time she had publicly accused him of being the father of the child and it became noised about. She called him a coward and said he was afraid to face the consequences of his own act. On another occasion she had with him a heated controversy over his neglect of the child and, in great anger, he seized her by the throat. In November she concluded to leave the sanitarium but appellant dissuaded her from doing so. On the seventeenth day of December she telephoned to an attorney in San Francisco in reference to her troubles and this was reported to appellant, who, the following day, left for his mine in Butte county and there obtained four sticks of dynamite. The mine is located about twenty-four miles from Oroville. Appellant left Oroville on the morning of the 19th of December and drove to the mine and returned that evening. At the mine he asked for dynamite "to take down to blow a rock out of the ditch or grounds around the sanitarium." He stated he had not seen any dynamite used and a small charge was prepared and exploded in his presence. He claimed that he had "an old miner down there around the sanitarium that knew how to use it, and he would be in no danger with it." No evidence was introduced at the trial that there was any such

miner at the sanitarium. There was only one piece of fuse taken by appellant, about three feet long, although there were several rocks that the defendant claimed he wanted to remove. The defendant was shown at the mine how to light the fuse, and it may be said that the fuse found at the place of the explosion corresponded in appearance with that which appellant obtained. He took the dynamite away from the mine and arrived at Fulton, a few miles from Santa Rosa, on the evening of December 20th, where he was met by Dr. Hitt, of the sanitarium. Appellant carried a satchel on his knees in the buggy and Dr. Hitt advised him to set it down between their feet but he continued to hold it. Appellant did not tell Dr. Hitt or anyone else that he had any dynamite. No other person knew anything about it being on the premises. Appellant had it in his possession at the sanitarium for forty-six days preceding the explosion, yet no attempt was made to blow the rocks from the ditch and they were still there at the time of the trial. After Lu Smith, in the presence of others, had reminded appellant that he was the father of her child, appellant began to charge her with insanity and falsely stated to different persons that she had threatened "to blow herself up and he feared that she was going to do it." Being asked how he thought she would accomplish it, he said: "It may be dynamite, or something of that nature." He also declared that it would be better if she and the child were both dead. Thursday before the explosion he promised to give the woman money in a few days. The next day he told her he had a check and he would have it cashed when he would give her the money. He asked her whether the baby's crib was "by the side of the bed or at the foot" in the tent. Sometime before that he went to the front of the tent, stepped on to the porch, looked in at the open door where he had a view of the location of the bed and baby's crib, and, feeling of the canvas, he remarked to the girl who was caring for the baby: "This is a nice tent." On Saturday, the day of the explosion, he again excused himself for not furnishing her the money, and she threatened to go away and bring suit against him. That night, February 5, 1910, about 7 o'clock, an attorney connected with the office of the attorney to whom she had previously telephoned arrived at the sanitarium and appellant was informed of his arrival. On the evening of the

explosion, about a quarter to 8, a Mr. Dillard, clerk of the sanitarium, left the sanitarium building and started toward his own cottage, which was westerly from the Lu Smith cottage. At this time Miss Smith was away from her tent and the light was out. Temporarily stopping in the road—not far from said tent—he saw Dr. Burke approaching him from the sanitarium, walking rapidly. The night was dark and when appellant reached a point within ten or fifteen feet of the witness the former turned and practically retraced his steps. No word was spoken between them. The dynamite that caused the explosion was attached to the wall of the tent above the wooden wall that came up near the top of the bed occupied by Miss Smith, the bed being immediately against the wall. She went to bed about 8 o'clock. She had put the baby in its crib and put out the light previous to that time and had gone to the bathroom some distance away to take a bath, leaving the baby alone, asleep. It was the theory of the prosecution that this was the time when Dillard saw appellant, and that the latter had taken advantage of the absence of Miss Smith to attach the dynamite to the outside wall of the tent. The explosion occurred about 9:30 o'clock and was that of dynamite. The woman was burned considerably and her flesh was torn in several places, especially on one of her arms. Under similar conditions as those existing at the tent, the prosecution made an experiment with the explosion of the same amount of dynamite as that secured by appellant as aforesaid and obtained similar results as to the force of the explosion and the marks on the tent. Shortly after the explosion appellant, standing near the tent, said: "I guess that girl has blown herself up," and the next morning he stated that it was too bad the explosion had not killed her as the baby would be better off without her. He was advised that the explosion should be investigated by the authorities, and he declared that "the matter would right itself" and that he "did not think an investigation was necessary." After witness Dillard had reported the explosion to the authorities appellant declared to him that he was too officious and that he had directed his brother, Alfred Burke, to telephone to the officers not to come and had sent to them a letter to that effect. The explosion was reported by Mr. Dillard to the sheriff about noon on the 6th of February, and Alfred

Burke delivered the letter about 4 o'clock in the afternoon. In this letter to the sheriff appellant stated that the explosion occurred "in the tent of a patient who is unbalanced in mind" and that she "will probably die as the result of the explosion," and "We do not know that she did it but think she did as she has repeatedly threatened 'to blow herself up.' We are quite able to cope with the situation, without troubling you." When the sheriff talked to him on that afternoon appellant stated that he had not known of any explosives being on the place. One week later two other peace officers interviewed him at the sanitarium and he was asked if there had been any dynamite or explosive on the premises and he replied that he "knew of no reason why any should have been used on the place, unless at the time of building a water flume there several years ago," and, on being further questioned, he stated positively that he knew of "no blasting powder or dynamite ever being on the place." Immediately after the explosion one Doctor Dessau, who was employed by appellant at the sanitarium, treated Miss Smith. He did not believe she was going to die, but appellant predicted her death. For some unexplained reason, Doctor Dessau was withdrawn from the case within a day or two and appellant took charge. He applied to the wound on the arm of Miss Smith a preparation contained in a box upon which was written, in appellant's handwriting, "Boracic acid." It contained, however, quite a percentage of arsenic, and it was a rational inference, from the surrounding circumstances, that appellant contemplated that the death of Miss Smith would be the result of the continued application of this "slow poison." His plan, however, was interfered with by the action of the district attorney.

The foregoing is not by any means an exhaustive *résumé* of the case for the people. Other circumstances of moment appeared to fortify the conclusion reached by the jury, two of which will be noticed in connection with the consideration of the question as to the admissibility of evidence. As to the showing made by the prosecution, it is sufficient comment to declare that seldom is such a case of circumstantial evidence made out. It is not only sufficient to support the verdict, but it is persuasive, satisfactory and convincing. Furthermore, it may be said that it seems difficult to under-

stand how anyone can read the cold record, dispassionately and without bias, and not be impressed with an abiding conviction of appellant's guilty participation in the crime charged against him.

Appellant complains bitterly of the conduct of the district attorney in his cross-examination of the character witnesses for the defense. Those witnesses testified to the good reputation of defendant for peace and quiet and also for chastity. On cross-examination they were asked if they had not heard that defendant had made a practice of committing abortions, and having improper intercourse with women and of taking undue liberties with female patients. The court permitted these questions but sustained an objection to the question asked of one witness if he had not heard of the defendant having been indicted by the grand jury of Lake county. No complaint is made of any question asked of the defendant himself. Under the authorities, the questions allowed by the court were properly permitted as affecting the weight of the testimony in relation to defendant's reputation. The district attorney did not claim anything as to the verity of the matters suggested or implied in his questions. The rule is that, on cross-examination of character witnesses, they may be asked as to specific reports concerning the trait of character involved, if they have a tendency to establish the bad reputation, although they may not be sufficient for that purpose. In *People v. Ah Lee Doon*, 97 Cal. 179, [31 Pac. 936], witnesses to the good disposition of defendant were permitted to be asked if they had heard of his prior conviction of murder and of his having drawn his pistol on different persons. The supreme court said: "In the cross-examination of witnesses testifying to reputation or character, such questions are permissible."

In *People v. Moran*, 144 Cal. 62, [77 Pac. 783], on cross-examination of a witness who had testified to defendant's good reputation for peace and quiet, it was held proper to ask if he had not read that within eighteen months defendant had been arrested for disturbing the peace—the court, through the chief justice, stating that it was strictly in line of cross-examination, and that "The cases cited by counsel to the proposition that it was misconduct in the prosecuting attorney to ask about the arrest for vagrancy do not sustain him,

the one nearest in point—*People v. Crandall*, 125 Cal. 134, [57 Pac. 785]—being distinctly against him.”

In *People v. Perry*, 144 Cal. 750, [78 Pac. 284], the questions on cross-examination whether the witnesses had heard that the defendant was charged with burglary and convicted of petit larceny were held admissible, the court quoting from *People v. Gordon*, 103 Cal. 574, [37 Pac. 535], to the effect that the opinion of the witness and the value of it “may be tested by asking him whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him.” (See, also, *People v. Weber*, 149 Cal. 342, [86 Pac. 671].)

Assuming that the question as to the indictment by the grand jury of Lake county was improper, it is sufficient to say that this is not a case where the mere asking of such a question should be held to require a reversal of the judgment. Counsel for appellant manifest a good deal of heat over the contention that the district attorney was not asking these questions in good faith. But how would counsel have the question of good faith determined? They did not ask the district attorney whether he was acting in good faith or whether he had any ground for believing that the witnesses had heard unfavorable reports concerning the conduct of appellant. And if he had volunteered such information in the presence of the jury, it is clear that it would have been palpable error. The fact is that, under the circumstances, we must assume that he was conscientiously discharging his duty as he understood it, and we can see nothing in his conduct in the examination of witnesses that was prejudicial to any substantial right of appellant. Besides, the answers to the questions were unfavorable to the prosecution, and therefore appellant suffered no harm. (*People v. Chin Hane*, 108 Cal. 604, [41 Pac. 697].)

The court did not abuse its discretion in limiting the number of character witnesses to thirteen. No evidence was offered by the prosecution to impeach that reputation and, as stated in *Bunnell v. Butler*, 23 Conn. 68: “There must necessarily be a limit to such inquiries, and it is for the court to prescribe it.” (*People v. Moan*, 65 Cal. 532, [4 Pac. 545]; *People v. Casselman*, 10 Cal. App. 241, [101 Pac. 693].) It is not at all likely that any additional witness would have added to the

force of the testimony of the large number testifying, none of whom was impeached or contradicted.

Miss Smith had testified on direct examination that she had sexual intercourse with appellant for the first time at Oakland, in June, 1906. On cross-examination impeachment was sought by showing that, before the grand jury, she had testified that in April, 1906, at the sanitarium, appellant "did things that no physician should do with a patient." On redirect, she was allowed, over the objection of appellant, to answer the question: "What were those things?" The question was equivalent to an inquiry for an explanation of her statement. It would certainly be a very harsh and unjust rule that would close the mouth of a witness under such circumstances, where an answer is capable of a construction either consistent or inconsistent with his other statements under oath. The law, on the contrary, indulges the presumption that a witness is speaking the truth, and affords him every reasonable opportunity to support that presumption and to appear in the proper light before the jury. On redirect examination it is proper for him to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from a matter drawn out on cross-examination, notwithstanding such facts and circumstances may prejudice the case for the defendant. (*People v. Corey*, 8 Cal. App. 725, [97 Pac. 907].)

We need not consider the contention of respondent that "the testimony would have been admissible on direct examination as showing the relation of the parties, and on the question of motive and as to the parentage of the child," as there can be no doubt that it was admissible in view of the cross-examination.

It is claimed that the court erred in excluding testimony as to the purpose and motive in making the trip to Bills mine. This is, of course, an important consideration, and relates to the time when the dynamite was secured. The rule, no doubt, is that "When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself are admissible in evidence (*Lund v. Inhabitants of Tyngsborough*, 9 Cush. (Mass.) 36).

. . . The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be." (*Mutual Life Ins Co. v. Hillman*, 145 U. S. 285, [36 L. Ed. 706, 12 Sup. Ct. Rep. 909]; *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 290, [71 Pac. 348].) In harmony with this rule the court allowed the greatest latitude to the appellant in showing what was said and done at the mine at the time he secured the dynamite. The court properly excluded evidence as to conversations between appellant and other parties that occurred days before the said visit to the mine. These conversations were no part of the *res gestae* and were clearly hearsay. As stated in *Aguirre v. Alexander*, 58 Cal. 26, the verbal declarations of a party to be admissible must accompany the act, the nature, object or motive of which is the subject of inquiry; they must be *contemporaneous* with the act to which they were intended to give character. *People v. Huntington*, 8 Cal. App. 612, [97 Pac. 760], is a case directly in point. Therein it was stated by the court, through Presiding Justice Cooper, that "The law would not permit a party who intended to perform an act that was criminal to make statements or declarations a day or two before the act, as to the lawful purpose in mind, and then introduce such declarations to justify himself." They are classed as self-serving declarations, and it is well settled that they are not admissible. (*Barkly v. Copeland*, 86 Cal. 489, [25 Pac. 1, 405].)

The court permitted evidence that one Marian Derig gave money to Lu Smith to induce her to depart from the state prior to the trial. The theory of the prosecution was that the said Derig was acting in behalf of defendant. Upon this theory alone could the evidence be properly received. To establish the co-operation, the people relied upon circumstantial evidence. Of course, it would be rare that any direct evidence could be afforded of the criminal connection in such a case. These are the circumstances which respondent urges as sufficient to justify or at least to render rational the inference that Marian Derig was acting as the agent of appellant: She had been a friend to the defendant for some time, having been a patient at his institution years before; after defendant

was charged with this crime she left her home in Los Angeles and came to the sanitarium under a fictitious name and remained there until shortly after Lu Smith departed. She went to the private residence of the defendant and did not register as guests usually do; though not a patient, she took part of her meals at her private rooms, especially during the last of her stay, when the negotiations with Lu Smith were begun; she and the defendant conferred in her private room and the housemaid was told to come back later; she stayed at the institution at his expense. After Lu Smith wrote the defendant requesting money to go to Japan, Marian Derig sought Lu Smith in Berkeley, where she was staying, and, during the pendency of the negotiations for the departure of Miss Smith, Marian Derig made trips to the sanitarium. Lu Smith had not seen nor corresponded with Marian Derig for four years prior to the commission of the offense; there was evidence that Marian Derig had no money of her own; there was no apparent reason why she should make a present of \$750 to Miss Smith; there was evidence that Marian Derig fabricated a letter of exoneration of appellant, purporting to have been written by Lu Smith, which letter was offered by appellant at the trial for the consideration of the jury. It is insisted that it is a legal and, in fact, the only reasonable inference from these circumstances that the act of Marian Derig was authorized and directed by appellant, and with this contention we entirely agree. The evidence connecting appellant with the transaction is more persuasive than that imputing participation in a felonious conspiracy to defendant in the case of *People v. Donnelly*, 143 Cal. 394, [77 Pac. 177], and yet in that case a conviction of murder was upheld by the supreme court. As stated in Underhill on Evidence, section 491: "It need not be shown that the parties actually came together and agreed in express terms to enter into and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole." We feel no doubt that the court was justified in permitting the jury to consider the testimony with the following admonition which it gave: "Unless you are satisfied from all the

evidence in the case that the defendant did cause or authorize the persuasion or disappearance of such witness, you cannot consider it as a circumstance against the defendant."

Other instructive cases cited by respondent in this connection are: *Chicago etc. v. Collins*, 56 Ill. 212; *Clark v. State*, 28 Tex. App. 189, [19 Am. St. Rep. 817, 12 S. W. 729]; *Fisher v. State*, 73 Ga. 596; *Wilkerson v. State*, 73 Ga. 799; *People v. Pitcher*, 15 Mich. 396; *McDovell v. Russell*, 37 Pa. 169; *State v. Prater*, 52 W. Va. 132, [43 S. E. 233]; *Harmon v. State*, 5 Tex. App. 549; *People v. Fehrenbach*, 102 Cal. 396, [36 Pac. 678]; *People v. Smith*, 151 Cal. 625, [91 Pac. 511].

It is claimed that it was error for the court to allow the prosecution to impeach and attack the character of the said Marian Derig, who was not a witness in the case. Appellant has placed a wrong construction upon the testimony. The facts of which complaint is made were developed while the witness Pierce was upon the stand. He was interrogated as to the movements and financial condition of said Marian Derig, which were material and relevant matters. His opportunity to know the facts and his relation to her were legitimate considerations for the jury. The substance of the testimony of Pierce to which objection is made is stated by respondent as follows: That he had lived with Marian Derig and had known her for four years; that she left Los Angeles in February on the train for San Francisco, and that she returned to Los Angeles about the 1st of May, stayed a short while and returned to San Francisco; that he had not seen her since, except once in October; that her maiden name was Summerville; that she had gone by his name for about four years; that he had known of her having no employment except demonstrating for him. "In weighing the testimony of witnesses a court or jury should, of course, take into consideration evidence disclosing their means of knowledge and relation to the parties and issues." (30 Am. & Eng. Ency. of Law, 1069.) "The law regards as relevant all facts which tend to illustrate the credibility of the witness or which enable the jury to determine the weight of his testimony." (*People v. Saunders*, 13 Cal. App. 747, [110 Pac. 825].) "The life and associations of a witness, whether impeachable or the reverse, are all relevant." (Underhill on Criminal Evidence, sec. 244.) Of course, the district attorney should not ask a wit-

ness a question merely for the purpose of degrading him or anyone connected with the case, but it cannot be said that we have an instance here of such misconduct.

Appellant seems to think that it was "most prejudicial error" on the part of the court in excluding evidence "of Lu Smith's illicit relations with other men and as to acts of lewdness on her part." The contention is made upon the ground that the issue was tendered by respondent. As to this appellant is in error. Besides, unless confined to the period of possible conception, the evidence was immaterial. This is not one of the methods recognized by the law for impeaching the credit or character of a witness. She was asked by the district attorney whether, during the months of May, June, July and August or September, 1908, she had the company of any other man than Doctor Burke, and she replied: "I did not or any other month." This latter part of the answer was manifestly not responsive to the question and should have been stricken out if a motion to that effect had been made. The purpose of the inquiry was clearly to eliminate the consideration of other than the defendant as the father of the child. On cross-examination, after testifying to the first act of intercourse with defendant, she was asked: "Up to that time had you never maintained any illicit relations with any man?" The district attorney objected to the question and the court erroneously overruled the objection. The error was in favor of appellant, but it did not preclude the court from ruling right and excluding further evidence as to the morality of the witness at a time long prior to the period already mentioned. The court stated that it would allow the defendant to show the relations of Lu Smith and any man at any time when such relation might have any bearing upon the question of the parentage of the child. That was as far as the court was required to go, and no evidence within that limitation was offered by appellant. "A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters." (*Sharon v. Sharon*, 79 Cal. 673, [22 Pac. 26, 131]; *Barkly v. Copeland*, 86 Cal. 490, [25 Pac. 1, 405]; *Pyle v. Piercy*, 122 Cal. 386, [55 Pac. 141]; *Estate of James*, 124 Cal. 657, [57 Pac. 578, 1008]; Code Civ. Proc., sec. 2051.)

In *People v. Benson*, 6 Cal. 221, [65 Am. Dec. 506], cited by appellant, evidence of intercourse with other men is said to be admissible in that class of cases, as tending to disprove the allegation of force. Here the act was voluntary on the part of each. Of course, it is also apparent that evidence of the character sought to be introduced would have no tendency to decrease the probability that appellant was the father of the child. As stated by respondent, "It would not legitimately aid the defendant to show that she was a prostitute instead of a mistress."

The prosecution offered evidence to show that, after the offense was committed, an attempt was made to substitute other dynamite for that which it is claimed was exploded by appellant as charged in the indictment. The story is an interesting one, but we cannot enter fully into its details. Appellant testified, in his own behalf, that at the time of the explosion when Lu Smith was injured, he had in his possession the dynamite which he had secured at the mine in December preceding, and that it continued to remain on the premises. He also offered an explanation of his denial to the officers that he ever had any on the place. He produced in court what he claimed to be the original package of dynamite. It was therefore manifestly proper for the people, in rebuttal, to impeach the genuineness and integrity of this dynamite. The only possible legal objection to the district attorney's efforts to do so is found in the contention that appellant's connection with the transaction was not shown. In this respect the situation is similar to that existing in reference to Marian Derig as aforesaid. The undertaking to secure the additional dynamite originated with one Golden, and the question is whether he was the agent of appellant in the premises. As with Marian Derig, so with him, we think there was abundant evidence of his agency to authorize the ruling of the court. Appellant argues the point as though respondent relied upon the fact of Golden's employment as attorney for appellant to justify the inference of criminal agency, but we do not understand respondent to make any such absurd claim. Our attention is called to many facts and circumstances, which we deem it unnecessary to specify, that can leave little, if any, doubt in the unprejudiced mind

that there was concert and collusion between Golden and the defendant to fabricate this evidence, as claimed by the people.

The witness, B. F. Greenwell, was called by the prosecution, and, among other things, he testified that Golden asked him to find four sticks of dynamite and that Golden said he had destroyed evidence that was necessary to keep the doctor from the penitentiary. Over the objection of appellant, the witness was asked if he had not told certain parties that Golden said "he had destroyed that dynamite, which was the only evidence that would save the defendant from the penitentiary." The ruling of the court was proper, under the authorities. (*People v. De Witt*, 68 Cal. 586, [10 Pac. 212]; *People v. Cook*, 148 Cal. 344, [83 Pac. 43]; *Zipperlen v. Southern Pac. R. Co.*, 7 Cal. App. 217, [93 Pac. 1049].) But at any rate, the ruling was without prejudice, since the answer was favorable to appellant and no impeaching evidence was offered by the people. (*People v. Chrisman*, 135 Cal. 287, [67 Pac. 136].)

During the progress of the trial Miss Smith, while on the stand one day, held her baby in her arms, and she was asked by the district attorney whether that was the child that she referred to in her testimony, and she answered in the affirmative. It is claimed that it was "gross error for the district attorney to bring in Lu Smith's illegitimate child and exhibit it to the jury." We know of no rule that precludes a woman from bringing into the courtroom her own child, whether legitimate or otherwise, and as to the said questions asked of the witness, it would be sufficient to say that no objection was made until they were answered. But in view of the question as to the paternity of the child, it was altogether proper to exhibit it to the jury that they might observe the resemblance, if any, to the putative father. "Taken by itself, proof of such resemblance would be insufficient to establish paternity; but it would be clearly a circumstance to be considered in connection with other facts tending to prove the issue on which the jury are to pass." (*Grant v. State*, 50 N. J. L. 490, [14 Atl. 600]; *In re Jessup*, 81 Cal. 417, [6 L. R. A. 594; 21 Pac. 976, 22 Pac. 742, 1028].) The later decisions hold such evidence admissible. In the second Biennial Supplement to Encyclopedia of Evidence, page 195, it is said: "Family resemblance; being nature's own identification is so

common and well known that there is no practical reason why the alleged offspring should not be exhibited to the jury in any case. . . . The jury are the best judges on the question of similarity, and, unless it exists, a production of the offspring would be in the defendant's favor." (See, also, *People v. Richardson*, 161 Cal. 552, [120 Pac. 20].)

It is equally clear that the court did not err in rejecting testimony of appellant's generous disposition. The rule is well settled that incidental and remote traits of character are not involved. (*People v. Fair*, 43 Cal. 137.) The court was quite liberal in allowing character evidence, but it could not, with any degree of propriety, enter upon an exploration of this illimitable field of remote and speculative inquiry.

We are satisfied also that the court did not improperly restrict the cross-examination as to the mental condition of Lu Smith. Appellant complains that he was not permitted to show that at times she labored under delusions and hallucinations. But it is pointed out by respondent that she was cross-examined for over two days as to every phase of her life and covering a period of over thirty years. There was no denial of defendant's right to the broadest inquiry of witnesses as to Lu Smith's sanity. He was not precluded from showing any acts or declarations of hers that would indicate mental unsoundness, and it is admitted that the opinions of witnesses upon the question were received together with the statement of the facts upon which they based their conclusions. The particular questions of which complaint is made were clearly not proper cross-examination, and it is at least doubtful whether they called for material testimony. The peculiar hallucination related to her belief that a certain professor in the university was in love with her and it was argued that she was under a similar delusion as to defendant. The pertinency of the testimony is hardly apparent. But at any rate, the professor was called by defendant and an objection of the district attorney was sustained to this question: "Were your relations ever anything other than that of instructor and student?" The matter is too inconsequential for further comment, but it is sufficient to say that the objection was sustained with "leave to offer the testimony later on." Of this privilege, however, appellant failed to avail himself.

It is earnestly contended that prejudicial error was committed by the court in permitting testimony of other crimes of appellant. Of the thirteen specifications, eight relate to matters concerning which the character witnesses for defendant were cross-examined. These we have sufficiently considered. Of the others one relates to the illicit relations with Lu Smith and the parentage of the child, one to subornation of perjury and preparation of false evidence, one to the inducement offered a witness to leave the state, one to lewd and lascivious conduct with the prosecuting witness, and the other to an attempt to poison her in the treatment of the injury she received at the time of the explosion of the dynamite. Evidence of the parentage of the child was clearly admissible as bearing upon the subject of motive. It is elementary that efforts to manufacture testimony or to induce adverse witnesses to leave the jurisdiction of the court is properly received as indicating a consciousness of guilt. The lewd and lascivious conduct was a circumstance naturally and logically connected with its expected and ordinary culmination to which we have referred. Appellant having been charged in the indictment with an intent to injure Lu Smith, a subsequent attempt on his part to take her life would be admissible to identify him as the one committing the original act. Besides, in another view, it would be properly received as an effort to destroy an important witness against appellant. It clearly does not come under the operation of the general rule that precludes evidence of one crime upon the trial of a charge for another.

It is held by all the authorities that, whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible. (*People v. Craig*, 111 Cal. 460, [44 Pac. 186]; *People v. Sanders*, 114 Cal. 216, [46 Pac. 153]; *People v. Wilson*, 117 Cal. 691, [49 Pac. 1054]; *People v. Valliere*, 123 Cal. 576, [56 Pac. 433]; *People v. Cook*, 148 Cal. 341, [83 Pac. 43]; *People v. Zimmerman*, 3 Cal. App. 87, [84 Pac. 446]; *People v. Crowley*, 13 Cal. App. 324, [109 Pac. 493]; *People v. Arberry*, 13 Cal. App. 751, [114 Pac. 411].)

The court did not err in declining to direct the district attorney to deliver to counsel for appellant a statement reduced

to writing of Lu Smith in order that it might be used in the cross-examination of Sheriff Smith. He was not interrogated concerning it in his direct examination and only incidentally referred to it in his statement of a conversation with appellant to which the question by the district attorney was addressed. The statement of Lu Smith was an entirely separate and distinct matter. There is no evidence that the sheriff had ever seen the written statement nor did he attempt to give its contents. He was permitted, however, on cross-examination to declare that he referred to her statement that Dr. Burke was the father of the child. Anything else in the writing was entirely beyond the legitimate scope of cross-examination. If it could be used at all, it would only be for the purpose of impeaching Lu Smith on some material matter, but it was not demanded in connection with her examination. (*People v. Glaze*, 139 Cal. 158, [72 Pac. 965].)

But even if it did not appear that it was not proper cross-examination, the refusal of the court to order the paper produced could not be held prejudicial error, as the record does not show the contents of the said statement. (*People v. Ruef*, 14 Cal. App. 583, [114 Pac. 57].)

We are satisfied the court did not unduly restrict the cross-examination of witness Dillard. Indeed, the court seems to have been quite indulgent in the matter of the examination of witnesses. The cross-examination of this particular witness covers over one hundred pages of the transcript. The principal complaint in this connection, however, is directed to the court's ruling sustaining the district attorney's objection to the offer by appellant to introduce in evidence a certain letter written by the witness. We deem it unnecessary to set out the letter. It is manifest that portions of it are entirely immaterial. The material part of it, if any, could be properly received only to impeach the witness, and, in order to lay the basis for its introduction the witness must have been interrogated concerning it. Appellant appears not to have pursued the course that the law requires, and he cannot now complain of the court's action.

Appellant contends that "the court erred in excluding evidence of defendant's whereabouts on night of explosion." We find no error in this respect. The defendant testified fully as to where he was, and neither he nor any other wit-

ness was precluded from testifying to any relevant fact in the attempt to establish an alibi. The court properly sustained an objection to certain questions calling for the conclusion or opinion of the witness, but there was no invasion of the right of appellant to the fullest inquiry as to all pertinent facts. The declarations of appellant as to where he had been and whither he was going constituted hearsay, and could be admissible only upon the theory that they were a part of the *res gestae*. The *res gestae* here must be directly connected with the explosion of the dynamite which caused the injury to the prosecuting witness. Declarations made at a different place and at a different time neither in law, logic nor in fact can be considered a part of said transaction. The subject is of elementary cognizance and need not be discussed. *People v. Kalkman*, 72 Cal. 212, [13 Pac. 500], is directly in point. (See, also, *People v. Chin Hane*, 108 Cal. 604, [41 Pac. 697]; *People v. Prather*, 120 Cal. 664, [53 Pac. 259]; *People v. Huntington*, 8 Cal. App. 621, [97 Pac. 760].)

R. A. Grigsby, a witness for defendant, qualified as a mining engineer, and, after describing the appearance of the rocks in the ditch hereinbefore referred to, he was asked the question: "From your experience as an engineer, what would be the most practical way to remove those rocks?" There was no error in the court's ruling that this was not a matter of expert testimony, that the witness was "in no better position as to that than these jurors, whether it required a crowbar or dynamite, or whether it required black powder, or what it might require." It may be said that appellant's witnesses were permitted to fully explain the situation as to the rocks so that there would and could be no doubt concerning the only feasible method of getting rid of them.

On the ground that it called for the conclusion of the witness, the court sustained an objection to the question asked of a Mr. Hedge: "Was there any secrecy about Dr. Burke's statements or movements or his actions in connection with the getting of that powder, Mr. Hedge?" Appellant was permitted the fullest latitude in showing his manner and conduct at the mine when he obtained the dynamite. What he said was also admitted in evidence. In fact, there was no showing of any secrecy in connection with his actions there, and it was not contended by the prosecution that there was

anything clandestine or mysterious about his movements at the mine. Hence the ruling could not have been prejudicial if erroneous. But it is clear that the question called for an inference within the exclusive province of the jury, and the court was right in so holding.

If there had been any contention or evidence to the contrary there might be some ground for the claim that the court erred in sustaining an objection to the question: "Did Dr. Burke say anything to you or to any person there at any time while he was there, asking you not to tell about giving the powder?" But as already appears, this would not have been in rebuttal of anything introduced by the people. Besides, evidence of the declarations of appellant "at any time" while at the mine would not be admissible. At most, his statements made at the time he procured the dynamite could properly be and it may be said they were received in evidence.

The district attorney's closing argument is made the subject of animadversion by appellant. It is declared that he "threw aside all discretion and all pretense of fairness and loudly declared to the jury in substance and effect that the people of the state of California had already found the defendant guilty and further threatened that the citizens of the state were watching and that the jury would not dare to do anything but so declare by their verdict." It is asserted that "the books do not record a more flagrant instance of gross violation of a defendant's rights, or more far-reaching in its prejudicial effect." It is apparent, though, that appellant, in characterizing and condemning the utterances of the district attorney, has manifested far more heat than did that officer, in his address to the jury. Here is what he said: "Let us have a law that is equal for rich and poor, for those in high estate and those in low estate, and a law like that if so administered will enjoy the confidence, deserve the reverence and support of the people of our state. To-night the people of our state look here to you. They are not looking here—those who are familiar with the facts of the case—to find out whether or not the defendant is guilty. They have conceded that he is. They are looking here to find out if a court of justice is going to declare him so." An exception was taken to the statements and the court said: "That statement as to what the public or other people think about it is to be

disregarded by the jury. It is not proper matter for their consideration at all." The first part of the above extract from the address sounds like a quotation from the Declaration of Independence and the latter part means simply that the people who are familiar with the facts of the case have already conceded that the defendant is guilty and they expect justice to be meted out to him. It contains nothing like a threat, and it could be considered by the jury only as an expression of the opinion of the district attorney that the facts of the case were sufficient to convince anyone of the guilt of defendant. The whole argument of the district attorney necessarily implied that he believed the defendant to be guilty, and that any fair-minded man familiar with the facts must reach the same conclusion. Of course, as held in many decisions, the range of discussion, illustration and argumentation of counsel is very wide; matters of common knowledge and historical facts may be referred to and interwoven in the argument, and allusion may be made to the prevalence of crime and the duty of the jury. (*People v. Molina*, 126 Cal. 507, [59 Pac. 34]; *People v. Glaze*, 139 Cal. 159, [72 Pac. 965]; *People v. Soeder*, 150 Cal. 12, [87 Pac. 1016]; *People v. Craig*, 152 Cal. 50, [91 Pac. 997]; *People v. McRoberts*, 1 Cal. App. 25, [81 Pac. 734]; *People v. Ye Foo*, 4 Cal. App. 740, [89 Pac. 450]; *People v. Amer*, 8 Cal. App. 139, [96 Pac. 401]; *People v. Ruef*, 14 Cal. App. 583, [114 Pac. 57].)

But if the remarks should be considered improper, we must presume that any injurious effect was forestalled or removed by the direction of the court. (*People v. Putnam*, 129 Cal. 262, [61 Pac. 961]; *People v. Benc*, 130 Cal. 165, [62 Pac. 404]; *People v. Shears*, 133 Cal. 159, [65 Pac. 295].)

Manifestly, some allowance must be made for the zeal of attorneys and some confidence reposed in the intelligence and fairness of the jury, and it may be said, generally, that every statement of the district attorney criticised by appellant is less objectionable than what has been held by the supreme court to be insufficient to warrant a reversal of the judgment.

There is a controversy between counsel as to whether the "substituted" dynamite was received in evidence, the contention of the district attorney being that it was, while, on the other side it is insisted that it was a piece of metal

connected with it rather than the dynamite itself which was introduced. The matter is too trivial for extended consideration, but there can be no doubt that such dynamite was exhibited to the jury by appellant, and, therefore, it became the subject of legitimate argument. Moreover, it is a fair inference from the record that it was actually received in evidence.

We find no error of the court in giving or refusing proposed instructions. One of the directions to the jury to which exception is taken is the following: "Therefore, if you are satisfied from the evidence in the case beyond a reasonable doubt and to a moral certainty that the crime charged in the indictment was directly committed by the defendant, as therein set forth, it would be your duty to find him guilty. So, too, if you should be likewise satisfied from the evidence in the case that the explosive referred to in said indictment was deposited and exploded by some other person than the defendant, whose identity is unknown, and you should be also satisfied from the evidence beyond a reasonable doubt that the defendant was concerned in the commission of such crime, as above explained, but that he did not directly commit the act constituting the offense, but aided and abetted in its commission, or not being present, advised and encouraged its commission, you should likewise return a verdict of guilty." The contention of appellant was expressed in the following proposed instruction which was refused by the court: "There is no evidence showing or tending to show that the defendant caused or procured any other person to deposit or explode such explosives. Therefore, if you believe from the evidence that the defendant did not personally at the time and place alleged in the indictment, deposit and explode the explosive as in said indictment alleged, you must acquit him." In his brief appellant goes a little further and contends that "if the evidence does not show who committed the act, the defendant should have been acquitted." We think appellant has taken an entirely erroneous view of the situation. In the first place, from the evidence introduced by the prosecution, it would be a fair inference either that the defendant personally exploded the dynamite or that it was done by someone else with his knowledge and co-operation. Hence, appellant's proposed instruction was prop-

erly refused. But it cannot be the law under our practice that a defendant must necessarily be acquitted of the crime charged, for the reason that it may be uncertain as to who committed the final act. Of course, it must be shown that the crime was actually committed. Of this there could be no doubt in the case at bar. And, since he can be charged in the indictment as a principal whether he actually committed the offense or aided and abetted or encouraged its commission, he can be justly convicted if the evidence shows that he was connected with the crime in either relation. The district attorney is not required to elect whether he will prosecute or ask for a conviction upon the ground that the defendant was the principal or an accessory before the fact, but he may ask for a verdict if the evidence satisfies the jury of either alternative. It appears to follow that the additional burden is not cast upon the people to identify someone else as having guilty connection with the crime. The rule seems to be correctly stated by the supreme court of Colorado, in *Goldberger v. People*, 45 Colo. 335, [101 Pac. 409]. There, on a charge of arson, a similar instruction was given by the lower court, and in the opinion it is said: "We are unable to see how a more succinct and accurate statement of the facts and circumstances necessary for the jury to find in order to warrant a verdict of guilty could well have been formulated. The information charges the defendant Goldberger directly and personally with the offense of arson. The state was not committed by this charge to any one theory or to any single line of proof as is contended for defendant by his attorney. If upon the whole testimony adduced the jury could find, beyond a reasonable doubt, that Goldberger, either personally or in conjunction with any other person or persons whomsoever, feloniously burned the buildings, or if it could find that he, by aiding, advising or abetting any other person or persons whomsoever, procured the felonious, willful and malicious burning of them, or either of them, then he was guilty, and it was the sole province of the jury, upon all the testimony, to determine that precise question. This instruction is clearly right, under the peculiar circumstances here shown. There was testimony to support, and the jury was warranted in returning a verdict of guilty, upon the theory that the defendant personally

set out the fire, or upon the theory that he conspired with Hathaway and so procured it to be set out, or that the defendant Hathaway and the witness Freund combined together to perpetrate the offense, or that he and Freund were the guilty co-conspirators. It would indeed be a novel doctrine if, under these conditions, the defendant by motion could have compelled the state to elect upon which theory it would proceed. Under our practice and the charge made, in view of the circumstances of this case as disclosed by the testimony, the state had a right to an instruction, which permitted the jury, upon all of the evidence, to determine the ultimate fact of guilt, without a limitation confining it to a consideration of any specific theory or aspect of the case." We do not see how any other sensible view can be taken of the subject, and we feel satisfied that in this respect there was no violation here of any legal principle. In *People v. Schoedde*, 126 Cal. 373, [58 Pac. 859], cited by appellant, it was decided that the principle which we have stated is sound, but it was held that it had no application, the supreme court stating that "under the evidence there is not disclosed that aiding and abetting by defendant which would make him a principal in the crime."

All proper instructions requested by appellant were either given or included in the charge of the court. No fact was assumed against appellant, and every principle of law necessary for the proper understanding of the case was set forth in apt terms. An examination of the charge is a sufficient refutation of the criticism of appellant, and we deem further specific notice unnecessary.

Counsel for appellant have severely criticised the conduct of the trial and they have unsparingly denounced the attitude of the district attorney and of the trial judge. They seem to think that the constitutional rights of the defendant were ruthlessly trampled under foot, and that he was "hurried against the law and the evidence" to an unwarranted conviction. It was even asserted in oral argument that scarcely any case could be found furnishing a more striking illustration of unfair treatment accorded to a defendant. The intemperate language of counsel is surprising, and it is not justified by the record. It simply illustrates, however, the partisanship and zeal for a client's cause that often unwittingly

tingly lead able and upright advocates to indulge in extravagant utterances and to assume positions that cannot be sustained. After an earnest consideration of the case we are unable to find evidence of any disposition on the part of the district attorney or of the trial judge to violate any of the rights of the accused. The representative of the people, it is true, conducted the prosecution with a good deal of vigor. Without it, however, he could not hope to prevail against the alert, aggressive and able counsel for appellant who stubbornly contested every inch of the way. His good faith was aspersed, his witnesses were impugned and his contentions ridiculed, and it is not surprising that he at times manifested some degree of asperity, but upon the whole his conduct of the case was admirable, and it cannot fairly be said that he departed in any substantial respect from the strict line of his duty. The intensity of the struggle and the persistence of counsel, it may be said also, tried the patience of the trial judge, but he presided with that decorum and unflinching sense of justice that should characterize an important judicial officer. Little that he said during the long trial calls for criticism or invites retraction, and nothing could have prejudiced the interests of defendant. In what we have stated we intend nothing in derogation of the character, ability or sincerity of counsel for defendant, but, as we understand it, most of their contentions merit scant attention and none of them should prevail to overthrow the verdict of the jury.

In a word, appellant was fairly tried and justly convicted. The record is unusually free from error, considering the length of the trial and the vehemence of the contest, and we are convinced that no appellate court would be justified in interfering with the judgment of the trial court. The judgment and order are, therefore, affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 25, 1912.

[Civ. No. 886. Third Appellate District.—January 27, 1912.]

L. W. HOPKINS, Appellant, v. MARY E. LEWIS,
Respondent.

SPECIFIC PERFORMANCE—CONTRACT FOR LAND WITH VENDOR'S AGENT—ABSTRACT—ABSENCE OF EXPRESS PROMISE—INACTION FOR SIX YEARS—CAUSE OF ACTION NOT STATED.—Where a contract to purchase land was made with a corporation, which was the vendor's agent, which referred to an abstract, with right to search title after its delivery, but contained no express promise to furnish an abstract, after an inaction of six years, during which no abstract was demanded, and during which the vendor had no knowledge of the existence of the contract, the rights of the purchaser must be determined by the contract with the agent, and a complaint for specific performance against the original vendor, after such inaction, which does not allege that the contract of purchase was intended to include a contract with the agent to furnish an abstract, states no cause of action.

ID.—RETURN OF DEPOSIT NOT NEGATIVED—FAIR INFERENCE FROM FACTS—CONCLUSION NOT TO PURCHASE.—Where the contract provided for a release of the contract and a return of the deposit if title was not shown by an abstract and was not made good, and the complaint does not allege what became of the deposit, and if the agent did its duty, the deposit was long ago returned and the transaction ended; and in view of all the facts appearing, it seems a fair inference therefrom that the plaintiff made up her mind not to purchase the property, or she would not have waited six years for an abstract without any demand therefor.

ID.—EFFECT OF IMPLIED OBLIGATION TO FURNISH ABSTRACT—REASONABLE TIME—RIGHT TO WITHDRAW—RUNNING OF STATUTE.—If it may be said that there was an implied obligation on the part of the vendor defendant to furnish the abstract, there being no time stated in which to perform this duty, the law would have given the defendant but a reasonable time therefor, and at its expiration the plaintiff would have the right to withdraw from the contract, and the statute of limitations would also, at the same time, begin to run against the enforcement of the contract.

ID.—BAR OF STATUTE—ACQUIESCENCE IN DEFAULT OF DEFENDANT.—In view of such implied obligation, the action would be barred by limitation. The plaintiff could not keep silent for six years, asserting no right whatever, making no demand for an abstract, expressing no willingness to complete the purchase, and doing no act in furtherance of her original purpose, without giving rise to the

presumption that she had acquiesced in defendant's default, and justifying defendant in so treating her contract.

ID.—GENERAL RULE AS TO ACQUIESCENCE IN BREACH OF CONTRACT OF PURCHASE—PRESUMPTION OF ABANDONMENT OF SPECIFIC PERFORMANCE.—Notwithstanding defendant's violation or express repudiation of his contract to sell land to the plaintiff, where the plaintiff delays to proceed for such length of time as to constitute acquiescence in defendant's breach, or a presumption of abandonment of his right to a specific performance, relief in equity for its enforcement will be denied.

ID.—LACHES—GENERAL DEMURRER.—The question of the plaintiff's laches may be raised by general demurrer to the complaint in equity, without specifying therein the laches of the plaintiff. It may be raised on the ground that the complaint does not show any ground for relief in equity, or, under the statute, does not state facts sufficient to constitute a cause of action.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

Lippitt & Lippitt, for Appellant.

Wm. B. Haskell, for Respondent.

CHIPMAN, P. J.—Action to enforce the specific performance of a contract for the sale and purchase of land. A demurrer to the second amended complaint for want of sufficient facts and that the action is barred by sections 337 and 343 of the Code of Civil Procedure was sustained, and, plaintiff declining further to amend her complaint, defendant had judgment, from which plaintiff appeals.

It appears from the amended complaint that on April 8, 1904, defendant executed and duly acknowledged an instrument in writing whereby she authorized and empowered Horn-Sinclair Co., a corporation, as her agent to sell certain described lots situated in Petaluma, "for the period of until sold from the date hereof, and thereafter, until said agency is withdrawn in writing, for the sum of \$300 net (\$300) dollars." The contract further provides that defendant will pay said company "upon finding a *bona fide* purchaser for said property — per cent of the selling price." There is a further

provision relating to the compensation of said company, not now important, which closes as follows: "Undersigned agrees to furnish abstract of and give perfect title to said property. Should title to said property be defective, undersigned shall, with all reasonable diligence, perfect the same." Duly recorded April 18, 1904. It is then averred that, acting for and on behalf of defendant, as her agent as aforesaid, the said company, by an instrument in writing, sold said land to plaintiff on April 8, 1904, and plaintiff agreed to buy the same, as follows: "Received from L. W. Hopkins the sum of one hundred dollars in gold coin, on account of and as a deposit, to secure the sale to her at the price of \$600—dollars in gold coin the following described property, viz.:" (the land in question) on the "following terms, to which both parties are mutually bound: \$100—cash deposit paid to-day and the balance of \$500—to be paid in cash upon receipt of a deed and perfect title. 10 days are to be allowed for legal search of title after the delivery of complete abstract. If title is not found perfect, thirty days are then to be allowed to make it perfect; and if it is not made perfect in that time, the deposit for which this is a receipt is to be immediately returned. Time is of the essence of this contract. If the title is found perfect and the sale is not closed in accordance with above terms, the deposit is to be forfeited, as fixed and settled damages, and not as a penalty." This memorandum is signed by J. W. Horn, and there is an averment that he was the president of said corporation and executed the contract for the corporation, and as part of said instrument the following appears:

"Petaluma, Cal., April 8, 1904.

"I hereby bind myself to buy the within-described property at the price and on the terms named herein; hereby agreeing to pay the balance of the purchase-money as specified above, but only if the title is found perfect. If the title is not found perfect, the seller then is to be allowed thirty days to make the title perfect and if it is not made perfect within that time I am released from this contract, and my deposit is to be at once returned. L. W. Hopkins." It is then averred that "defendant has never at any time since the 8th day of April, 1904, furnished an abstract of title to the property described in the agreement, set forth in paragraph II (the first of the foregoing documents) and, on the 16th day of December, 1909,

the plaintiff made a written demand upon the defendant requiring the defendant to procure and furnish to the plaintiff for her use, an abstract of title of the lands and premises described, and the defendant has failed, refused and neglected to furnish the abstract of title, as agreed upon by her by the terms of said written agreement" (the agreement first above referred to). It is then averred that, on March 15, 1910, the said corporation, on behalf of plaintiff, served a written notice on defendant (which is set out in the complaint) informing defendant of the sale and its terms, made to Hopkins on April 8, 1904, and further informing her that said Hopkins "has this day [March 15, 1909] paid to us the balance of \$500, and has waived the furnishing of the abstract of title which she heretofore and on the 16th day of December, 1909, demanded of you." Then follow averments of tender of \$600 and a deed conveying the property to Hopkins and a demand that defendant execute and deliver said deed to said Hopkins. Plaintiff, Hopkins, in writing, as part of the foregoing paper, joins in the tender of the \$600 and demand for a deed. It is further averred that, on April 2, 1910, plaintiff tendered to defendant \$600 and a deed duly prepared and demanded its execution by defendant, and that defendant refused to execute the same. Ability and willingness to pay the purchase price is averred and that a deposit of said amount has been made in a bank at Petaluma for the purpose of paying said purchase price. It is also averred that the price agreed to be paid for said lands was just and reasonable and the value of said lands; that the said contract, first above referred to, was entered into by defendant without any misrepresentation or unfair practice of any person, and that ever since said April 8, 1904, defendant has been, and now is, the owner of said land, and has been and is able to make and deliver plaintiff a deed thereto.

It seems to be conceded by both parties that the demurrer was sustained because the action was barred either by laches or by the provisions of the code sections referred to, or both. No other ground for the decision is discussed in the briefs.

Plaintiff's position is that there was an obligation on defendant to furnish an abstract of title as a condition precedent to any act of plaintiff by way of tender or demand of deed and, until such abstract was furnished, the statute of limita-

tions was not set in motion; that plaintiff might have waived the condition precedent, as she did in March, 1910, thus setting the statute in motion, but that until such waiver or until defendant had complied with the condition of the contract and furnished the abstract, the time within which an action for specific performance should be commenced did not run. The principle relied upon is thus stated in 25 Cyc. 1067: "Generally speaking, where a party's right depends upon the happening of a certain event in the future, the cause of action accrues, and the statute begins to run only from the time."

The corporation was the agent of defendant and as such made the contract with plaintiff, but the contract of defendant with her agent is distinct from that made with plaintiff. In the contract of agency there was a provision that defendant would furnish an abstract, but no such promise was made by the agent in its contract with plaintiff, and it is not alleged in the complaint that its agreement with plaintiff was intended to include such promise. The language is: "10 days are allowed for legal search of title after the delivery of complete abstract," but by whom this abstract was to be made and at whose cost, or when, does not appear by the contract nor by any averments of the complaint. The plaintiff, in her complaint, refers to the agency contract, but it formed no part of her contract or of the terms on which she agreed to make the purchase. The agent could have agreed to furnish an abstract, for it was so authorized, but it did not do so. It nowhere appears in the contract with plaintiff or in the complaint that she knew anything about the terms of the agency contract or acted with reference thereto. So far as we can see, plaintiff's rights must be determined upon her contract with defendant's agent. It does not appear that either the agent or plaintiff took any steps toward consummating the sale, after the contract was entered into, for nearly six years. It does not appear that defendant knew, until in 1910, that the agent had made a sale to plaintiff, nor does it appear that either the agent or plaintiff made any demand on defendant for an abstract, or that plaintiff made any such demand on the agent, until after this long lapse of time. It may be true, as alleged in the complaint, that the price agreed upon "was an adequate consideration for the land" at the time the agreement was entered into, and that the land

was not then of value "greater than the amount set forth in said agreement," but that does not throw much light on its value six years later. This fact, however, might not be material if defendant had failed to perform her part of the agreement and plaintiff had fully performed her part. But we have here the contention of plaintiff that under the agreement she could remain inactive for an indefinite period and could come forward twenty years after the contract was entered into and demand a deed if defendant had failed to furnish an abstract. We cannot believe she had any such right. Under her contract she was given "ten days for legal search of title after the delivery of complete abstract." This probably means that after an abstract had been made by someone ten days were given to have it passed upon by some competent lawyer. If the title was not found perfect, thirty days were "allowed to make it perfect; and if it is not made perfect in that time, the deposit for which this is a receipt is to be immediately returned," or, as plaintiff expressed it in her indorsement: "I am released from this contract, and my deposit is to be at once returned." It does not appear in the complaint what became of this deposit. If plaintiff insisted on her rights and if the agent did its duty, this deposit was long ago returned to plaintiff and the transaction ended.

It seems to us a fair inference from all the facts, so far as disclosed, that plaintiff made up her mind not to purchase the property or she would not have waited six years for an abstract which she now says it was defendant's duty to have furnished at least within a reasonable time, there having been no stated time named for its delivery. The equities of the case may be seen if we reverse the parties and suppose the defendant (having knowledge of the contract, which she did not), after six years of inaction, had, without any explanation or cause for her delay, come forward with an abstract showing perfect title. No court would have enforced the contract against plaintiff. But if it may be said that there was an implied obligation on defendant's part to furnish the abstract, there being no time stated in which to perform this duty, the law would have given defendant but a reasonable time and, at its expiration, plaintiff would have had the right to withdraw from the contract. The statute would also at

that time have begun to run against the enforcement of the contract.

In that view we think the action would be barred. Plaintiff could not keep silent for six years, asserting no right whatever, making no demand for an abstract, expressing no willingness to complete the purchase, doing no act in furtherance of her original purpose, without giving rise to the presumption that she had acquiesced in defendant's default and justifying defendant in so treating her contract. In *Marsh v. Lott*, 156 Cal. 643, 648, [105 Pac. 968], the court states the rule to be, as given in 26 American and English Encyclopedia of Law, page 80, that where, after defendant's violation or an express repudiation of his contract, the plaintiff delays to proceed for such length of time as to constitute acquiescence in defendant's breach, or a presumption of abandonment of his right to specific performance, relief in equity will be denied. We think the facts here bring the case within this rule.

The question of plaintiff's laches could be raised by the general demurrer without specifically alleging laches. It was said in *Kleinclaus v. Dutard*, 147 Cal. 245, 250, [81 Pac. 516, 517]: "It is settled in this state by the two California cases last cited that the defense of laches may be raised by demurrer, the defense being in substance, as said in one of the cases, that the bill does not show equity, or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action." It would seem to be logical that, if laches shows want of sufficient facts, an averment of want of facts could be supported by showing laches. (See, also, *Marsh v. Lott*, 156 Cal. 643, [105 Pac. 968].) We are unable to discover any ground on which the complaint may be held sufficient.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 913. Third Appellate District.—January 27, 1912.]

DAVID E. JAQUES, Appellant, v. O. N. OWENS,
Respondent.

VENUE—CHANGE OF PLACE OF TRIAL—RESIDENCE OF DEFENDANT—INSUFFICIENT AFFIDAVIT—PROPER AMENDMENT.—Where the defendant made a proper demand to change the place of trial of an action to the county of his residence, but the affidavit was insufficient in merely stating his residence as of the time of making the affidavit, the court did not abuse its discretion in allowing him to amend the affidavit by stating his residence at the time of the commencement of the action and ever since.

ID.—POWER OF COURT TO ALLOW AMENDMENT UNDER SECTION 473—LIBERAL CONSTRUCTION—RELATION BACK TO ORIGINAL.—The court had the power to allow the amendment to the affidavit under section 473 of the Code of Civil Procedure, which is to be liberally construed, with a view to promote justice. The amended affidavit when allowed, related back to the time of the filing of the original affidavit; and it then furnished information upon the ground of the motion for a change of the place of trial, and supplied sufficient evidence to warrant the order granting it.

ID.—PRESENCE OF PARTIES IN COURT AT TIME OF MOTION UPON AMENDED AFFIDAVIT—AMENDED NOTICE NOT REQUIRED.—The parties being in court when the amended affidavit was allowed, and the motion thereupon was heard, no amended or additional notice of the motion was required.

ID.—FORMAL NOTICE OF MOTION NOT NECESSARY—REGULATION UNDER RULES OF COURT.—The statute does not require formal notice of the motion to change the place of trial. When the demand and application with demurrer were served and filed, the plaintiff had due notice of the application. Any additional notice would be regulated or determined by the rules of the court. The "motion" is the formal application in court for the order, in its regular course of procedure; and the court, in such regular course, has jurisdiction to hear and determine the motion.

APPEAL from an order of the Superior Court of San Joaquin County, changing the place of trial. Frank H. Smith, Judge.

The facts are stated in the opinion of the court.

C. W. Eastin, for Appellant.

John F. Davis, for Respondent.

BURNETT, J.—This is an appeal from an order changing the place of trial. At the time of serving and filing his demurrer to the complaint, the defendant served upon plaintiff and filed a notice of motion for a change of venue, on the ground of his residence, together with an affidavit of merits and a demand in writing that the trial be had in the proper county. At the time and place specified in the notice the plaintiff appeared and opposed the demand and motion. The original affidavit of the defendant contained the clause: "I am the defendant in said action, and I reside in the city and county of San Francisco." At the beginning of the hearing the court, over the objection of plaintiff, permitted the defendant to serve upon plaintiff and file an amended affidavit containing, in place of the last-quoted clause, the following: "I am the defendant in said action, and at the commencement of this action resided, ever since have resided, and I now reside in the city and county of San Francisco, State of California." It is apparent that the first affidavit was defective in its failure to aver that defendant resided in San Francisco *at the time of the commencement of the action*. By the amendment this omission was supplied, and the sole question is whether the court rightly exercised its authority in permitting said amended affidavit to be filed.

Section 396 of the Code of Civil Procedure provides that "if the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein unless the defendant, at the time he answers or demurs, files an affidavit of merits and demands in writing that the trial be had in the proper county." As pointed out by respondent, two jurisdictional pleadings are therefore required to secure a change of the place of trial, to wit: A *demand in writing* and an *affidavit of merits*. The demand was in proper form and no objection was made to it. That the court has the discretion to allow the affidavit of merits to be amended has been directly determined in *Palmer & Roy v. Barclay*, 92 Cal. 199, [28 Pac. 226], and *Pittman*

v. *Carstenbrook*, 11 Cal. App. 224, [104 Pac. 699]. In the former it is said that, "Under section 473 of the Code of Civil Procedure, which is to be liberally construed, with a view to promote justice, the trial court has power, in the exercise of its discretion, to allow an insufficient affidavit of merits, which has been filed in due time upon a motion to change the place of trial of an action, to be amended after the time for filing the original affidavit has expired, and the filing of the amended affidavit relates back to the time of the filing of the original affidavit." There can be no contention here that the court abused its discretion in any way in allowing the amendment. The amendment simply supplied what was manifestly omitted from the original affidavit by inadvertence and no injury was done to appellant. There was no counter-affidavit and no attempt made by plaintiff to show that the residence of defendant was otherwise than as claimed by him.

As far as the notice of the motion is concerned, the amended affidavit, as held in the *Barclay* case, *supra*, related back to the time of filing the original affidavit and thus furnished information of the ground of the motion and supplied sufficient evidence to warrant the order granting it. Since the parties were in court, it would, of course, have been idle to require an amended or additional notice to be given of the motion. Indeed, the statute requires no formal notice beyond the demand and the affidavit of merits. The only purpose to be subserved by any other notice would be, to give information of the time when the application would be heard. This would be regulated or determined according to the rules of the court. When the said demand and affidavit with the demurrer were served and filed, the plaintiff had due notice of the application and the court acquired jurisdiction to hear, in the regular course of procedure, the demand of defendant to have the place of trial changed. It is true that section 397 of the Code of Civil Procedure contemplates that the order of the court shall be made "on motion," but the basis for the motion, as we have seen, is the demand and affidavit of merits. The "motion" is obviously the formal application in court for the order.

We find nothing in any of the cases cited by appellant opposed to the foregoing view of the situation. There seems to be no consideration of substantial justice that requires a reversal of the order, and it is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 906. Third Appellate District.—January 27, 1912.]

CARL A. MITCHELL, Appellant, v. WALTER ELMER BROWN, as Executor of the Last Will of ELIZABETH M. HAFFNER, Deceased, Respondent.

ACTION BY SECOND HUSBAND OF CHILD'S MOTHER AGAINST ESTATE OF ADOPTING PARENT—AGREEMENT FOR COMPENSATION—PRIMA FACIE CASE—IMPROPER NONSUIT.—In an action by the second husband of the mother of a child which had been legally adopted by the deceased, after the mother's divorce from its father, and which had been committed to the care of the mother and such second husband under an agreement for compensation, which action was brought for such compensation upon a rejected claim against the adopting parents' estate, and in which the evidence for the plaintiff was sufficient to make a *prima facie* case for recovery, it was error to grant a nonsuit therein at the close of the plaintiff's evidence.

Id.—EFFECT OF LEGAL ADOPTION—TERMINATION OF PARENTAL OBLIGATIONS—LEGAL CONTRACT WITH PARENTS.—After the legal adoption of a minor child by another person the parental obligations of its natural parents cease to exist, and they are no more legally liable for the maintenance, support and education of such child than would be a perfect stranger. It follows that an adopting parent may contract with the natural parents, or with its mother and her second husband, to take care of, support and educate the child for compensation, as freely and legally as such a contract could be made by the adopting parent with a stranger to the blood of such child.

Id.—EFFECT OF MOTION FOR NONSUIT—LEGAL VIEW OF EVIDENCE.—A motion for a nonsuit at the close of the plaintiff's evidence presents to the decision of the court to which it is addressed a question of law, pure and simple. It should be denied when there is any evidence to sustain plaintiff's case, without passing upon the question of its sufficiency, or as to whether the court believes it or not. Upon such motion, the material facts which the evidence tends to prove must be assumed to be true; and if the evidence is fairly sus-

ceptible of two constructions, the court must take the view most favorable to the plaintiff; and if contradictory evidence has been given, it must be disregarded.

ID.—APPLICATION OF PRINCIPLES OF EVIDENCE TO NONSUIT.—It is held that, applying the principles of evidence to the motion for a nonsuit, the evidence for the plaintiff must be taken as showing that the agreement for compensation was with the plaintiff's husband as well as with his wife, the child's mother; that the care of the adopted child cannot be presumed gratuitous; that an explanation of a payment of \$1,100 made to the mother after receiving the adopted child, not connected with compensation therefor, but in consideration of her relinquishment of a claim against a different estate, in which her mother and the adopting parent were interested, must be assumed as true; and that every favorable inference and presumption from the evidence must be taken as true; and that the nonsuit cannot be sustained.

ID.—REVIEW OF ERRORS IN EVIDENCE.—Errors in evidence cannot be reviewed upon an appeal from the judgment involving only the motion for a nonsuit, but may be reviewed upon appeal from an order granting a new trial.

ID.—EVIDENCE OF PAYMENT OF MONEY AFTER CARE OF CHILD ADMISSIBLE ON CROSS-EXAMINATION.—The court properly allowed evidence on the cross-examination of the plaintiff to show that the \$1,100 had been received from the adopting parent by the mother after she received the care of the child for the purpose of an inference that it was received in payment therefor, though the answer may show a purpose foreign thereto.

APPEAL from a judgment of the Superior Court of Marin County, entered upon an order granting a nonsuit, and from an order denying a new trial. Thos. J. Lennon, Judge.

The facts are stated in the opinion of the court.

F. J. Castelhun, for Appellant.

Clinton G. Dodge, and J. M. Inman, for Respondent.

HART, J.—On the sixteenth day of December, 1909, the plaintiff presented to the defendant, as the executor of the estate of Elizabeth M. Haffner, deceased, a claim for the sum of \$1,200 for the support, maintenance and education of one Alpha W. Mitchell, the minor adopted daughter of the de-

ceased, for the period of four years, from the twentieth day of September, 1905, at the monthly rate of \$25.

On the twenty-third day of December, 1909, the defendant rejected said claim, and thereupon the plaintiff instituted this action to recover upon the same.

This appeal is from the judgment entered upon an order granting a nonsuit on the motion of the defendant and from the order denying plaintiff a new trial.

The facts are, briefly, these: Daisy Mitchell was the granddaughter of the deceased and the mother of Alpha W. Mitchell by her first husband, Walter Mitchell. Daisy Mitchell was divorced from Walter Mitchell and thereafter the former went to the home of the deceased and there lived a considerable portion of the time until the date of her marriage to plaintiff (also Mitchell by name), on the ninth day of September, 1905. On the twenty-eighth day of March, 1905, and subsequently to the entry of the decree granting Daisy Mitchell a divorce from her first husband, the deceased, by legal proceedings, instituted in the Marin county superior court for that purpose, adopted Alpha W. Mitchell, who, at that time, was not quite five years of age, as her own child. The latter remained and lived with deceased until the intermarriage of her natural mother, Daisy Mitchell, with the plaintiff, on the ninth day of September, 1905, at which time she left the home of her adopted mother and took up her residence with her natural mother and the latter's husband. The circumstances under which the last-mentioned event occurred are detailed by Daisy Mitchell as follows:

"At the time of my marriage [to plaintiff] Mrs. Haffner was living in Sausalito. Alpha was there from the time of her adoption up to the time of my marriage; I was there off and on; on the evening when I expected to be married I was packing up my things to ship them to Mill Valley; Mrs. Haffner said she didn't know what she was going to do, she said she felt that she was not in a position to take care of the girl; that she was getting old and was sick and was worried; she wanted me to take her with me; we were married the same evening and came back to the house; Mrs. Haffner, Mr. Mitchell, Alpha and myself were sitting at the supper table; I went in to take my hat; when I came out Mrs. Haffner

wanted to know if I was not going to take Alpha with me; she said, 'I cannot take care of her any more; I am getting old, sick and worried; it is too much trouble for me. You take her. I will make it all right with you.'

"Q. What did she say to Mr. Mitchell, if anything? A. She said for him to take her and be good to her.

"Q. That is the language? A. That is the language. She said 'Take her and be good to her.' She said 'I will fix it all right with you.' The same night we took the child with us to our home and she has been there ever since. I clothed her, sewed for her, did everything that was to be done for a child of her age, sent her to school, bought her books and everything like that."

The testimony of Daisy Mitchell constituted all the evidence that was offered and received on behalf of plaintiff. It was at the conclusion of her testimony that the court granted defendant's motion for a nonsuit.

We think that the order granting the nonsuit was erroneous and that the judgment must, therefore, be reversed.

The legality of the proceedings culminating in the adoption of Alpha Mitchell by the deceased is not questioned here.

The legal effect of the proceedings by which Alpha became the adopted child of the deceased was to disrobe the natural parents of all parental or any authority over the minor. The child, by virtue of those proceedings and the order of the court therein, became, in all respects, legally the child of the deceased (Civ. Code, sec. 227), and from the time of the adoption thenceforward the deceased and the child sustained toward each other the legal relation of parent and child and had all the rights and were subject to all the duties of that relation. (Civ. Code, sec. 228.) Furthermore, the natural parents of the child, from the time of her adoption, were relieved of all parental duties toward, and all responsibility for, the child, and, as before stated, can legally exercise no right over her. (Civ. Code, sec. 229.)

It follows from the foregoing rules of the law of this state that, after the adoption of a minor child by another, the parental obligations of the natural parents to such child cease to exist, and that the former, after such adoption, are no more legally liable for the maintenance, support and educa-

tion of the child than a perfect stranger would be. And it furthermore follows that an adopted parent may contract with the natural parents to take care of, support and educate the adopted child for compensation as freely and legally as such a contract could be made by the adopted parent with a stranger to the blood of such child.

With the law as thus stated in view, we shall proceed to consider whether, under the evidence, the court was justified in making the order granting the nonsuit.

That a motion for a nonsuit presents for the decision of the court to which it is addressed a question of law, pure and simple, is a proposition so well settled in this state that it might well be regarded as a work of supererogation to cite authorities in its support. The proposition is, however, affirmed by many cases, of which the following may be mentioned: *Felton v. Millard*, 81 Cal. 540, [21 Pac. 533, 22 Pac. 750]; *Higgins v. Ragsdale*, 83 Cal. 219, [23 Pac. 316]; *Warren v. McGill*, 103 Cal. 153, [37 Pac. 144]; *Zilmer v. Gerichten*, 111 Cal. 73, [43 Pac. 408]; *Goldstone v. Merchants' Ice & Cold St. Co.*, 123 Cal. 625, [56 Pac. 776]; *Hanley v. California etc. Co.*, 127 Cal. 232, [47 L. R. A. 597, 59 Pac. 577]; *Estate of Arnold*, 147 Cal. 583, [82 Pac. 252]; *Estate of Welch*, 6 Cal. App. 45, [91 Pac. 336]; *Archibald's Estate v. Matteson*, 5 Cal. App. 441, [90 Pac. 723]; *Nonrefillable Bottle Co. v. Robertson*, 8 Cal. App. 103, [96 Pac. 324]; *Bush v. Wood*, 8 Cal. App. 650, [97 Pac. 709]; *In re Daly's Estate*, 15 Cal. App. 329, [114 Pac. 787].

In *Goldstone v. Merchants' Ice & Cold Storage Co.*, 123 Cal. 625, [56 Pac. 776], it is said: "A nonsuit should be denied where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint."

"A nonsuit should be denied," says the court in *Zilmer v. Gerichten*, 111 Cal. 73, [43 Pac. 408], "when there is any evidence to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence."

In *Hanley v. California etc. Co.*, 127 Cal. 232, [47 L. R. A. 597, 59 Pac. 577], the court said: "This rule must be applied to all the evidence submitted by the plaintiff."

In *Bush v. Wood*, 8 Cal. App. 650, [97 Pac. 709], the rule is thus stated: "It is clear that it makes no difference, where

the motion for a nonsuit is made on the close of plaintiff's case, whether the court itself believes the testimony or not, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purpose of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading."

Following the contention of counsel for defendant that, if the evidence showed that the services of which the claim for compensation is predicated were actually performed by the plaintiff, such services were disclosed by said evidence to be purely gratuitous, the court granted the motion for nonsuit upon the ground that the testimony failed to establish either an express or implied contract between the deceased and the plaintiff for the care and support of the child.

But does the evidence, considered, as it must be on such a motion, in a light most favorable to the plaintiff, fail to disclose an agreement? In answering this question, we shall confine ourselves to a consideration of the testimony bearing upon the actual occurrences attending the transaction by which plaintiff took the custody and charge of the child, and will not consider the effect, ordinarily, in legal contemplation, of a request by one to another that the latter perform some service for him without any reference to the matter of compensation for such service.

Mrs. Daisy Mitchell testified and repeatedly declared that Mrs. Haffner said, not only to her but to her husband, the plaintiff herein, "Take her and be good to her," referring to the child; "I will fix it all right with you," or, "I will make it all right with you." She testified that on the very day on which Mrs. Haffner thus addressed them they took the child and for four years from that time they "clothed her, sewed for her, did everything that was to be done for a child of her age, sent her to school, bought her books and everything like that." There is nothing so vague in the language of the deceased, "I will make [or fix] it all right with you," as to make it doubtful as to its meaning. It seems to us that but one meaning can rationally be ascribed to that language, and that is that, if the plaintiff and his wife would take charge of and provide for the child, she (deceased) would reasonably com-

pensate them for the services so rendered. The language is at least capable of that interpretation, and on a motion of this character it is the duty of the court to which such motion is submitted to view the testimony most favorably to the plaintiff, and, therefore, to so construe said language. As is said in the *Estate of Arnold*, 147 Cal. 583, [82 Pac. 252]: "Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants," or, as here, the plaintiff.

But counsel insist that the language of the deceased above quoted was addressed to Mrs. Mitchell and not to the plaintiff. We do not so read the record. On page 18 of the transcript, it appears, as shown, that Mrs. Mitchell was asked the following questions and made the following answers: "Q. What did she [meaning deceased] say to Mr. Mitchell, if anything? A. She said for him to take her and be good to her. Q. That is the language? A. That is the language. She said: 'Take her and be good to her.' She said, 'I will fix it all right with you.'" The answers thus returned were to questions specifically directed to the ascertainment of what deceased said to the plaintiff when she requested him to take the child. That witness was thus referring to the language addressed by the deceased to plaintiff on the subject, we think can admit of no room for doubt.

Emphasis is also laid upon the fact, developed on the cross-examination of Mrs. Mitchell, that the deceased gave her the sum of \$1,100 after her intermarriage with plaintiff and within the period during which she had the custody of Alpha. But we cannot see that that fact can in any manner or degree support the order granting the nonsuit. Assuming that that circumstance, on the trial on the merits, might properly be regarded as contradictory to the claim declared upon by plaintiff, still, as so viewed, it cannot be considered on a motion for a nonsuit presented on the close of plaintiff's case. "All the evidence in favor of the contestants [plaintiff] must be taken as true, and if contradictory evidence has been given, it must be disregarded." (*Estate of Arnold*, 147 Cal. 583, [82 Pac. 252].)

Moreover, assuming that the fact was brought out for the purpose of disclosing that the plaintiff and his wife had thus been partly or fully compensated for their services in caring for the little girl, then the natural inference therefrom, which it would be the duty of the court to draw and consider in favor of plaintiff on the motion, is that the deceased recognized the existence of an agreement on her part, whether express or implied is immaterial, to reimburse or compensate either the plaintiff or his wife, or both, for the expenses and services incident to the maintenance, support and education of the child. In this view of the testimony with regard to the \$1,100, the case of plaintiff would, obviously, be materially strengthened and would render more apparent the error of the order.

Mrs. Mitchell, however, explained the gift to her of the sum of money named as follows: That, her own mother (daughter of deceased) being dead at the time of the death of Mrs. Haffner's husband, she, after the latter's death, relinquished to deceased all the right to and interest in the estate of her grandfather to which her mother, as heir of the last named, would have been entitled had she been living at the time of the death of her father, and that in consideration of such relinquishment, Mrs. Haffner gave to Mrs. Mitchell the said sum of \$1,100. It was, of course, the duty of the court, on the motion, to view the testimony of Mrs. Mitchell on this point most favorably to the plaintiff, and, therefore, to that end to accept as verity, or at least to assume as true, her explanation of the reason or purpose for which that money was given her by the deceased.

Counsel further lay much stress upon the fact, admitted by Mrs. Mitchell, that neither she nor plaintiff ever made any demand on the deceased during her lifetime for compensation for taking care of the child. Undoubtedly that fact, not satisfactorily explained, would be entitled to much consideration and perhaps considerable weight in the determination of the issue upon its merits, but upon a motion for a nonsuit it is entitled to no consideration whatever against the right of the plaintiff to have the cause determined upon its merits.

Nor will it do to argue, in reply to our views of the record as it is presented here, that, it being a natural or moral duty resting on plaintiff's wife to care for the child, the court

was, therefore, justified in inferring from that proposition that the services of plaintiff in that respect were gratuitous. There can, of course, be no doubt that the care and maintenance of a minor by its natural parents under any circumstances would be a most humane and proper thing to do, and, where necessary, any parent made of the right sort of material would do so, even if the law did not place that duty upon him. But we are here dealing with legal obligations and duties. The natural mother of the child, as we have seen, lost all legal authority over and was relieved from all legal obligations to maintain and support the child immediately upon the latter's adoption by the deceased. The relation of parent and child between Mrs. Mitchell and Alpha legally ceased to exist, upon the adoption, as completely as if that relation between them had never existed. As to the plaintiff himself, the adoption having taken place prior to his intermarriage with the natural mother of the child, the latter never, at any time, either subsequently to or (much less) before the adoption, bore any relation of whatsoever nature to him. On a trial on the merits of the controversy, in a case of this character, where the main facts adduced are irreconcilably contradictory, the fact of the natural, as contradistinguished from the legal, duty of a party in the premises might be entitled to considerable weight, and, indeed, might throw the scales against the claimant or plaintiff. But on a motion for a nonsuit, submitted on the close of plaintiff's case, it is the duty of the court to draw all inferences that are deducible from the testimony in view of the *legal* obligations, duties and responsibilities of the parties, and not in view of what one of the parties ought to and would perhaps naturally do under certain circumstances.

If the case had been submitted on the merits of the issue upon the testimony presented by the plaintiff, we doubt not, judging from the ruling on the motion, that the court would have rendered judgment for the defendant, in which case it is very probable that the action of the court would stand immune from disturbance on appeal, so far as the evidence was concerned. And we may with propriety suggest here that, if counsel for the defendant had rested their case on the testimony of plaintiff prior to the presentation of their motion for a nonsuit, a much different proposition might,

perhaps, be submitted here for review. (*Estate of Morey*, 147 Cal. 507, [82 Pac. 57].) It is said in that case: "But with regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, *upon all the evidence*, it is clear that if the jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial," citing a number of cases. Of course, the rule as thus stated does not mean that the motion, if made after both parties rest their case, should be granted in every case where the trial court might grant a new trial for insufficiency of evidence for plaintiff, but only that the court may do so in very clear cases.

But, on a motion for a nonsuit on the close of plaintiff's case, the court is compelled to assume the truth of all the testimony produced by plaintiff. The question of the credibility of witnesses or the weight of evidence cannot under such circumstances arise. In fine, as we have in effect already pointed out, the line of distinction between the power of the court when considering the evidence on a motion for a nonsuit on the close of plaintiff's case and the power vested in it when considering the evidence upon the merits is that, in the former case, a pure question of law is submitted for the court's decision, and there is therefore no discretion in the court to pass upon the credibility of the witnesses for plaintiff or the probative value of the testimony produced by plaintiff; while, in the latter case, a question of fact is submitted to the court, it then being called upon to determine whether the issue has been established by the proofs, and the court, like a jury where the issues of fact are so tried, may then weigh the testimony and to that end pass upon the credibility of the witnesses and, finally, conclusively determine the truth as to the ultimate fact.

The defendant in this action did not rest his case on the close of plaintiff's case, but, upon the conclusion of the adduction of evidence by the plaintiff, made a motion for a nonsuit. Upon this motion, under such circumstances, it was therefore, as we have shown, imperatively incumbent on the court to view plaintiff's testimony in the light of a truthful narration of the facts, considering, indeed, as facts proved,

"every favorable inference deducible, and every favorable presumption arising, from the evidence so produced," and to disregard all contradictory evidence or facts inconsistent with plaintiff's evidence or with the theory of his case.

Under the evidence upon which the motion was submitted and granted, viewed by the light of the rules governing the consideration and disposition of motions for nonsuit on the close of the case for plaintiff, we can see no possible escape from the conclusion that the court erred in its ruling on the motion in this case.

As we have seen, the defendant has also appealed from an order denying his motion for a new trial. The basis of the motion was an alleged error of the court in the admission of certain testimony. It is thoroughly settled that errors in the rulings of the court admitting or rejecting evidence may not be considered or reviewed on a motion for a nonsuit. But, as the case is to be retried and the order appealed from should be disposed of, we will express our views as to the propriety of the testimony thus complained of.

The order appealed from is objected to on the ground that the court committed prejudicial error in allowing, over objection by counsel for plaintiff, Mrs. Mitchell to be asked and answer the question, on her cross-examination, whether, after she took charge of the child, Mrs. Haffner had given her any money. The answer brought the reply that the deceased had given her the sum of \$1,100, to which reference has hitherto been made. The argument is that, since the action is by the husband of Mrs. Mitchell for services alleged to have been performed by him, it was immaterial whether the witness had been given or paid any money by Mrs. Haffner. The specific purpose for the disclosure by the defendant of the gift or payment of the sum of \$1,100 by Mrs. Haffner seems to have been to show that a payment had been made "on this claim," and for that purpose the question and the testimony elicited thereby were perfectly proper. It would manifestly be immaterial, so far as the question of the propriety of such testimony is affected, whether the money was paid to Mrs. Mitchell or her husband if, in point of fact, the purpose for which the money was so paid or given was to compensate the plaintiff and his wife for their services in taking care of the child. And it is equally manifest that the defendant had

the right to inquire into that transaction for the purpose suggested, although the answer might, as it did, indicate that it was given for a different purpose or a purpose altogether foreign to the arrangement for the care of the child.

For the reasons herewith given, the judgment entered upon the order granting the nonsuit is reversed and the order denying plaintiff's motion for a new trial is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1115. Second Appellate District.—January 29, 1912.]

Z. H. RUBENSTINE, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, and Hon. W. M. CONLEY, Judge Thereof, Respondents.

JUSTICE'S COURT—APPEAL—EXCEPTION TO SURETIES—SERVICE OF NOTICE BY MAIL—INSUFFICIENT AFFIDAVIT.—Where the notice of exception to the sureties upon appeal from the justice's court was served by mail, and the affidavit of service thereof does not show that the attorneys for the plaintiff and the defendant resided in different places, or that there was any communication by mail between them, such affidavit is insufficient to establish the fact of substituted service by mail, under section 1012 of the Code of Civil Procedure.

ID.—REFUSAL OF SUPERIOR COURT TO DISMISS APPEAL—WRIT OF REVIEW—ASSUMED RIGHT TO SHOW PERSONAL SERVICE—ERROR IN EXERCISE OF JURISDICTION.—Assuming the right of the petitioner for a writ of review to annul the action of the superior court in refusing to dismiss the appeal for nonjustification of the sureties after insufficient proof of service of notice thereof by mail, to adduce other evidence touching the acts of the parties, tending to show personal service of the notice of exception to the sureties, yet, nevertheless, it was within the jurisdiction of the superior court to determine the sufficiency of such proof, if any was offered; and the writ of review will not lie for any error in the exercise of jurisdiction.

PETITION for Writ of Review to annul the action of the Superior Court of Los Angeles County. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

Fette, Potter & Bearman, for Petitioner.

Denio & Hart, for Respondents.

THE COURT.—It appears from the record that in an action pending in a justice's court of Long Beach township, Los Angeles county, wherein petitioner was plaintiff and one M. A. Dyer was defendant, judgment was rendered against defendant; that within due time notice of appeal was served upon petitioner by defendant, and an undertaking on appeal filed on the fourteenth day of October, 1911; that on the sixteenth day of October, 1911, petitioner filed with the said justice written exception to the sureties, and on the same day deposited in the United States mail at the city of Los Angeles a notice of such exception, addressed to the attorneys of defendant at Long Beach, California, in which notice the petitioner assumed the duty of fixing the date for justification of the sureties, and fixed the eighteenth day of October, 1911, as the date for the appearance and justification; that on said date all parties appeared at the office of the magistrate, who was absent from the city of Long Beach and was not present at his office during the entire day, and the sureties did not justify, although being in attendance for that purpose. The justice transmitted all of the papers to the clerk of the superior court, and thereafter the petitioner moved the court to dismiss the appeal, because the sureties did not justify after exception filed. This motion to dismiss was heard by the superior court and denied, and this court is asked to annul and adjudge void such order denying the motion to dismiss the appeal.

It does not appear from the record that service of the notice of exception to the sureties was had upon counsel for appellant, which notice is said to be necessary in *Roush v. Van Hagen*, 17 Cal. 122. The affidavit attached to the notice merely states that the same was placed in a sealed envelope, addressed to Denio & Hart at their offices in the city of Long Beach, county of Los Angeles, state of California, postage prepaid. It nowhere appears in the record that the attorneys of plaintiff and defendant resided or had their offices in differ-

ent places, or that there was any communication by mail between Long Beach and the city of Los Angeles. The service of notice of the exception upon appellant's counsel was substituted service, attempted to be made under section 1012, Code of Civil Procedure. This section provides that service by mail may be made when the person making the service and the person on whom it is made reside or have their offices in different places, between which there is a regular communication by mail. "Service by mail is good only where the person making the service and the person on whom it is to be made reside in different places, between which there is regular mail communication; and the affidavit of service must show a strict compliance with these provisions of the statute, or otherwise the evidence is insufficient to establish the fact of service." (*Linforth v. White*, 129 Cal. 191, [61 Pac. 910].) Assuming the right of petitioner herein, notwithstanding the insufficiency of the proof of service of notice, to establish the facts amounting to the same by other evidence, and assuming the right of the court upon the motion to hear evidence touching the acts of the parties in connection with the attempted justification as tending to show personal service, nevertheless it was within the jurisdiction of the superior court to determine the sufficiency of such proof, if any was offered; and having jurisdiction to hear the motion, and proof in support thereof, this writ will not lie, even though the court was in error in its judgment. We are of opinion that the rule laid down in *Buckley v. Superior Court*, 96 Cal. 121, [31 Pac. 8], and *Sherer v. Superior Court*, 96 Cal. 653, [31 Pac. 565], may be properly invoked in this proceeding.

Application for writ denied.

[Crim. No. 170. Third Appellate District.—February 1, 1912.]

**THE PEOPLE, Respondent, v. HARRY PALUMA,
Appellant.**

CRIMINAL LAW—ATTEMPT TO COMMIT GRAND LARCENY—NATURE AND PROOF OF CRIME CHARGED.—Under a charge of an attempt to commit grand larceny, when the *animus furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. When there is a person from whom the property may be taken, an intent to take it against the will of the owner, and some act performed tending to accomplish it, the crime is committed, whether the property could in fact be taken or not.

ID.—NATURE OF ATTEMPT TO COMMIT CRIME.—An attempt to commit a crime, in general, involves an intent and endeavor to accomplish a crime, carried beyond mere preparation, and combined with an act which falls short of the thing intended. Mere intention to commit a specific crime does not of itself amount to an attempt to commit it; but there must be, in addition to the wicked intent, some act done toward its ultimate accomplishment.

ID.—SUPPORT OF VERDICT FOR OFFENSE CHARGED.—It is held, upon a review of the evidence, that it is sufficient to support the verdict of conviction of the defendant of the crime of an attempt to commit grand larceny as charged in the information.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

Carlton C. Case, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, Deputy Attorney General, for Respondent.

BURNETT, J.—Appellant, jointly charged with one Louis Forrester with an attempt to commit grand larceny, was convicted on a separate trial and sentenced to the penitentiary for four years, and he appeals from the judgment and the order denying his motion for a new trial. The only point

concerning which there can be any controversy—in fact, the only contention seriously urged by appellant—is that the evidence is insufficient to warrant the verdict. In this respect it is not claimed that there was a failure to show the purpose or preparation on the part of defendant to commit the crime of grand larceny, but it is argued that there was no overt act sufficient to constitute an *attempt* within the contemplation of law. The statute does not prescribe what steps shall be construed as an attempt to commit a crime, yet it makes provision for its punishment. There is no difficulty, however, in determining the meaning of the expression, although its application to the particular facts of each case may not be so easy.

As stated by Bouvier, in criminal law an attempt is “an endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it.” “An intent to do a particular criminal thing combined with an act which falls short of the thing intended.” “An act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution, including solicitations of another.”

In *People v. Moran*, 123 N. Y. 257, [20 Am. St. Rep. 732, 10 L. R. A. 109, 25 N. E. 412], it is said: “Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged there must be a person from whom the property may be taken; an intent to take it against the will of the owner and some act performed tending to accomplish it, and when these things concur, the crime has, we think, been committed whether property could, in fact, have been taken or not.”

The question of what constitutes an attempt is elaborately considered in *People v. Stites*, 75 Cal. 570, [17 Pac. 693]. Therein it is said that “Mere intention to commit a specific crime does not itself amount to an attempt as that word is employed in the criminal law. There must, in addition to the wicked intent—the *mens rea*—be some act done toward the ultimate accomplishment of the proposed crime.” In as-

certaining whether such act has been accomplished, it is further declared that "the proximity or remoteness of the person or thing intended to be injured is generally an important element, as the adjudicated cases will show," and quotation is made from Blackburn, J., in *Regina v. Cheeseman*, Leigh & C., 140, that "If the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

We are entirely satisfied that, within the purview and spirit of the foregoing, the defendant was justly convicted as charged in the information. A brief statement of the evidence will make this apparent.

Appellant and his codefendant came to Stockton on the same train and stopped at the same hotel. Two or three days later appellant took a pair of shoes to one De Martini, who was engaged in the shoe business on California street in said city, and left them to be half-soled. He engaged Mr. De Martini in conversation, speaking in the Italian language. He asked about the business and suggested that De Martini ought to have a larger stock and take a partner to put in more money, that the business might be enlarged. The proprietor replied that he didn't care about a partner, that he was doing very well as it was. Paluma then took a paper out of his pocket and, reading about a man that played the valise game and secured some money, he said: "I don't know what the valise game is," and he asked De Martini what it was. The latter replied that he didn't know, but he proceeded to explain the game as he understood it. Appellant then left the store and did not return until the next day. He remained then only a short time. He was asked if he wanted the shoes, but he said no, that he would get them the next day. He came back the next morning and had been there a few minutes when the codefendant, Forrester, arrived and tried to get in at the wrong door and appellant let him in at the proper entrance. Forrester inquired if they spoke Italian, and, being answered in the affirmative, he asked to be directed to the "Imperial Hotel," stating that he had just come in on the train and had missed his way. De Martini gave him the information. Forrester then told Paluma an interesting story, whose details we need not recite, and he then produced a twenty-dollar gold piece and said to De

Martini, "I will give you twenty dollars to show me where the hotel is," but appellant responded that he would show him as a favor. They then went out, but they did not go to the hotel. In about fifteen minutes Paluma returned and, after waiting for the departure of a Mr. Orsi, who was in the store, he said to De Martini: "I had good luck this morning. I made twenty dollars to go from here over to the Imperial Hotel," and he unfolded a plan of Forrester to distribute \$10,000 among the poor of Stockton and to employ two men for the purpose and appellant said that he was to be one, and furthermore, "if you want to you can make the other party. He will give us twenty dollars a day for every day we spend in that pursuit and besides he will double all the money you got. He wants to know the men are responsible, and in order to show responsibility you got to show him some money. If you can show \$500, why besides giving you twenty dollars a day for the time you lose he will double your money, he will make you a present of \$500." De Martini said he had no money that morning, but would try to get some from his friends if they would wait till the next day, but he was urged by appellant to get it that afternoon as someone else might get in. De Martini said he would try. Appellant said they would be back that afternoon. He then went out and, shortly after 12 o'clock, both returned and Forrester submitted the same proposition and then, or on a previous occasion, he pulled out a package from his pocket wrapped in manila wrapping paper, about the size of a greenback and two inches thick, and showed a greenback or two and said that the package was full of that kind. Paluma asked De Martini if he had any money in the bank, and the latter said "Yes." About this time a police officer came in and asked what appellant and his confederate were doing. No reply was made, and he then asked Paluma if he intended to get his shoes, and the reply was: "I guess not." The two were then placed under arrest. Forrester thereafter undid this package while it was in his pocket and took the paper out and threw it in the waste basket. Two handkerchiefs were found in his pocket. One of them he took out and unfolded, but the other was found folded about the size of a greenback. Each of the defendants was found to have in his possession a big, long,

blue, cloth-lined envelope and an empty black bag just alike. It seems very clear that the defendants were acting according to a prearranged plan and, as said in *People v. Mann*, 113 Cal. 79, [45 Pac. 183], they were "playing a confidence game, and 'bunco' is its name." That Mr. De Martini was not "buncoed" out of his money was not due to any penitence or abandonment of their plan by defendants, or either of them. They did everything they could toward the accomplishment of their felonious purpose. The visit to the store of the prosecuting witness under the circumstances detailed, the false and alluring representations that were submitted to him and the efforts made to induce him to exhibit his money and to fall into the snare so deliberately and cunningly devised for him, constitute an attempt within any reasonable view of that term. Appellant says the whole thing was a "joke," but such jokes are rather too frequent to be encouraged by adopting the exceedingly technical construction of the law which has been urged upon us. The manifest rascality of appellant certainly does not invite overnice distinctions in his favor.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 871. Third Appellate District.—February 1, 1912.]

W. F. ERVING, Respondent, v. **NAPA VALLEY BREWING COMPANY**, a Corporation, Defendant; **E. W. CHURCHILL**, Intervenor and Appellant, and **JAS. H. GOODMAN & COMPANY BANK**, Intervenor.

REPLEVIN—FINDINGS SUPPORTING JUDGMENT—MORTGAGE RIGHTS OF APPEALING INTERVENOR—CONCLUSION OF LAW—SPECIAL FINDING NOT ESSENTIAL.—Where in an action for the claim and delivery of personal property the findings were for the plaintiff and against defendant and the bank, intervenor, and supported the judgment against them, and was also against the appealing intervenor, who claimed as the assignee of a mortgage made on the property by a former owner, and who claimed the same rights in the personal

property as affixed to the realty that were asserted by the bank, and who alleged that the bank is now the owner of the property, and the court merely found, as a conclusion of law, that such intervenor "is not entitled to take anything by reason of his complaint in intervention," and he appealed from the judgment on the judgment-roll, it is held that his claim that the judgment must be reversed for want of a special finding is without merit.

ID.—PRESUMPTION ON APPEAL OF INTERVENOR—ABSENCE OF EVIDENCE—WAIVER OF FINDINGS—DESERTION OF ISSUE.—It will be presumed on the appeal of the intervenor from the judgment, on the judgment-roll alone, that either the intervenor offered no evidence in support of the averments of his complaint in intervention, or if he did, that findings thereon were waived, or that the issue was deserted and required no finding.

ID.—GENERAL RULE AS TO INTENDMENTS ON APPEAL IN SUPPORT OF JUDGMENT.—The settled rule in this state is that where the appeal is from the judgment on the judgment-roll alone, and where the findings support the judgment, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which could have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary.

APPEAL from a judgment of the Superior Court of Napa County. H. C. Gesford, Judge.

The facts are stated in the opinion of the court.

Frank L. Coombs, for E. W. Churchill, Intervenor-Appellant.

F. E. Johnston, H. L. Johnston, and L. E. Johnston, for Plaintiff-Respondent.

Nathan F. Coombs, and John T. York, for Napa Valley Brewing Company, Defendant.

Frank L. Coombs, for Jas. H. Goodman & Co. Bank, Intervenor.

HART, J.—The plaintiff instituted this action in claim and delivery against the defendant for the recovery of the possession of certain personal property, described in the com-

plaint, and alleged to be of the value of \$6,000. Said property was situated in a certain building in the city of Napa, and consists of certain machinery and mechanical equipments which were used by the defendant in the manufacture of beer. The complaint alleges that, on the seventeenth day of September, 1910, and at the time of the filing of the complaint, the plaintiff was the owner and entitled to the possession of said personal property; alleges the wrongful possession and the wrongful withholding of the possession of said property by defendant from plaintiff; that, prior to the commencement of this action, the plaintiff demanded the return of the possession of said property, but that said "defendant refused, and still refuses, to deliver said personal property, or any part thereof, to this plaintiff." Plaintiff asks that he be awarded judgment restoring to him the possession of said property, or for the sum of \$6,000, the alleged value thereof, in case delivery cannot be had.

The defendant, by its answer, denies that the personal property described in the complaint is of the value of \$6,000, but alleges that the value of said property did not, at the times mentioned in the complaint, or at any other time, exceed the sum of \$500; denies that it "unlawfully withholds and detains," etc., said property from the possession of the plaintiff; alleges, on information and belief, that the property referred to in the complaint "does not belong, did not at the time of the commencement of the action belong, and never has belonged, to plaintiff, and that plaintiff has never been the owner thereof; that the rightful and lawful owner of said property is the Jas. H. Goodman & Co. Bank, a banking corporation, . . . having its principal place of business in the city of Napa, said state."

Churchill, by permission of the court, filed a complaint in intervention, wherein he alleges that the building in which the personal property described in the complaint is situated was, together with the land upon which it is located, the property of the Napa Ice and Cold Storage Company, a corporation; that, on the sixteenth day of January, 1906, said corporation executed its promissory note for the sum of \$12,500 in favor of and payable to one E. H. Tryon, and that, contemporaneously with the execution and delivery of said note, made and executed, in favor of said Tryon,

and as security for the payment of said note, a mortgage upon said real property—the land and the building in which the alleged personal property sued for is situated; that said mortgage was duly recorded, and that no part of said promissory note has been paid; that on the sixteenth day of January, 1908—the date of the maturity of said note, it having been made payable on or before two years after its date—said note and mortgage were regularly assigned by said Tryon to Churchill. It is further alleged by this intervenor, upon information and belief, that, at the time of the execution of said note and mortgage to said Tryon, the property described in the complaint was owned by the said Napa Ice and Cold Storage Company; that it was, and “ever since has been, and now is, attached to and made a part of the said real property,” and that said mortgage “was, ever since has been, and now is, a valid and subsisting lien upon said property, described as personal property” in said complaint. It is averred, on information and belief, that the property described as “personal property” in the complaint, “cannot be detached from said premises, or taken away, without injury to the freehold, and without decreasing the value of the said lands against which intervenor has his lien, as aforesaid.” The tenth paragraph of Churchill’s complaint in intervention declares, upon information and belief, that the property mentioned in the complaint “belongs to and is owned by the Jas. H. Goodman & Co. Bank, . . . and does not belong to plaintiff, and that plaintiff has no interest in the same.”

The Jas. H. Goodman & Co. Bank, a corporation, also filed a complaint in intervention, in which it sets up ownership of the property described in plaintiff’s complaint, and denies plaintiff’s alleged ownership thereof and his alleged right to the possession of the same, and alleges that the “defendant is in lawful possession and entitled to the possession thereof.”

The court found that the plaintiff “was, on the seventeenth day of September, 1910, ever since then continuously has been, and is now, the owner and entitled to the possession of all that certain personal property,” describing the property mentioned in the complaint; that the value of said property was and is \$1,750; that the defendant, Napa Valley Brewing Company, unlawfully withholds and detains the possession

of said property from the plaintiff; that said Jas. H. Goodman & Co. Bank, intervenor, is not and was never the owner or entitled to the possession of said personal property. As conclusions of law, the court finds that the plaintiff is entitled to the possession of said personal property, or in default of delivery thereof to plaintiff by defendant, that the former recover from the latter the sum of \$1,750, the value of said property; that "the intervenor, E. W. Churchill, is not entitled to take anything by reason of his complaint in intervention herein."

Judgment was given and entered accordingly.

The appeal now before us is by the intervenor, Churchill, from the judgment on the judgment-roll alone.

The defendant, Napa Valley Brewing Company, appealed from said judgment, but said appeal was, on motion, dismissed by this court on the eighteenth day of April, 1911. (*Erving v. Napa Valley Brewing Co.*, 16 Cal. App. 41, [116 Pac. 331].)

The court made no finding of fact based upon the allegations of appellant's complaint in intervention. The only reference to the allegations of said complaint is to be found in the conclusions of law as above noted and in the judgment, as follows: "That the relief sought by the complaint in intervention filed herein by E. W. Churchill be, and the same is hereby, denied and that said intervenor take nothing by his said complaint in intervention."

The contention of appellant is that he is entitled to have his "claim disposed of one way or the other," and that the failure of the court to make a finding in relation thereto constitutes a defect in the findings fatal to the judgment. This contention presents the single question submitted for decision by this appeal.

We think that the point advanced by appellant is destitute of merit.

The rule in this state, as announced and affirmed and confirmed by a long and unbroken line of decisions, is that, where the appeal is from the judgment on the judgment-roll alone, and where the findings support the judgment, "all intentions will be made in support of the judgment, and *all* proceedings necessary to its validity will be presumed to have been regularly taken; and any matters which might have

been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary." (*Von Schmidt v. Von Schmidt*, 104 Cal. 550, [38 Pac. 361]; *Johnston v. Callahan*, 146 Cal. 214, [79 Pac. 870]; *Galvin v. Palmer*, 134 Cal. 427, [66 Pac. 572]; *Butler v. Soule*, 124 Cal. 73, [56 Pac. 601]; *In re Eichhoff*, 101 Cal. 605, [36 Pac. 11]; *Eichhoff v. Eichhoff*, 107 Cal. 42, [48 Am. St. Rep. 110, 40 Pac. 24]; *Suchler v. Look*, 93 Cal. 601, [29 Pac. 34]; *Segerstrom v. Scott*, 16 Cal. App. 256, [116 Pac. 690].)

There can, of course, be no doubt, and, indeed, none is expressed, that the findings support the judgment. The sole complaint is, as stated, that the appellant was entitled to a finding or to findings upon the issues presented by his pleading.

But there is no showing by the record that the appellant offered any evidence in support of the averments of his complaint, and the presumption is and must be indulged, in the absence of such a showing, that none was presented at the trial. (*Himmelman v. Henry*, 84 Cal. 104, [23 Pac. 1098]; *Kaiser v. Dalto*, 140 Cal. 170, [73 Pac. 828]; *Gregory v. Gregory*, 102 Cal. 52, [36 Pac. 364].) If, however, appellant claims that whether evidence was or was not presented in support of the averments of his complaint, it was, nevertheless, the duty of the court to make findings upon the issue submitted by his pleading, the reply is that the presumption is, in the absence of a contradictory showing, that he waived findings as to that issue. (*Mulcahy v. Glazier et al.*, 51 Cal. 626; *Campbell v. Coburn*, 77 Cal. 36, [18 Pac. 860]; *Kritzer v. Tracy Engineering Co.*, 16 Cal. App. 287, [116 Pac. 700].) There is nothing in the record indicating or showing that the appellant did not waive findings.

But counsel for the appellant seems to contend that, since findings of fact were filed, it must be inferred that findings as to the issues submitted by the complaint in intervention were not waived. We do not see how we can so infer or presume without destroying or rendering nugatory that other presumption to which we have referred, and which must be indulged where there is no bill of exceptions or other properly authenticated record of the evidence, that all intendments must be made in support of the judgment and all proceed-

ings necessary to its validity be deemed to have been regularly taken. For aught that we can know to the contrary, the appellant might, *ex industria*, have abandoned his affirmative resistance to plaintiff's action. Indeed, upon the presumption that he offered no evidence in support of the claims of his complaint, we have a right to so assume. And, so assuming, why should the court be required to make a finding upon a deserted issue, even if it could justly be concluded that findings are not, under the circumstances, to be deemed to have been waived by appellant? We think that the disposition by the court of appellant's case, as made solely by his complaint, in its conclusions of law was sufficient under the circumstances. In other words, the conclusion of the court, as a matter of law, as to the point raised by appellant's complaint, could have been neither more nor less than as it here appears from a finding which, presumptively, the court must have made, had it made any at all, in relation to the issue submitted by his pleading.

The cases of *Emeric v. Alvarado*, 64 Cal. 603, [2 Pac. 418], *Kirman v. Hunnewill*, 93 Cal. 519, [29 Pac. 124], and *Savings & L. Soc. v. Burnett*, 106 Cal. 539, [39 Pac. 922], cited by appellant, are not in point here. In each of those cases, the appeal was supported by a bill of exceptions or a statement, and, of course, under such circumstances, a court of review is able to determine whether all the proceedings culminating in the findings and conclusions of law are regular and support the judgment, or whether the court was justified in making its findings, or whether it omitted to make a finding upon a material issue which the evidence warranted and required it to make.

For the reasons herein given the judgment is affirmed.

Burnett, J., and Chipman, P. J., concurred.

[Civ. No. 910. Third Appellate District.—February 1, 1912.]

ISAAC OSTROM, Respondent, v. L. P. WOODBURY,
Appellant.

ACTION ON NOTES—EVIDENCE—SPECIAL DEFENSE—CONDITIONS INDORSED—IMMATERIAL VARIANCE—DEFENDANT NOT MISLED.—Where two notes sued upon were on their face unconditional promises of the defendant to pay the principal sum, six months after date with interest, and their execution and delivery were not denied, but defendant had pleaded as a defense that each of them "was a conditional note, with certain conditions indorsed on the back thereof, which conditions have not been complied with," and the face of such note was introduced in evidence, the defendant cannot insist that there was a material variance on plaintiff's part in not offering in evidence the indorsements, since the defendant was not misled thereby to his prejudice, in maintaining his defense.

ID.—EFFECT OF SPECIAL DEFENSE—AIDED BY COMPLAINT.—The effect of the pleading of the special defenses to each of such notes was to aid the complaint in those particulars in which it is claimed that the complaint was defective in not pleading the notes in full, and to supply the omissions objected to.

ID.—INDORSEMENTS OF CONDITIONS OF PURCHASE OF MINING STOCK—PROOF OF NONACCEPTANCE—SUPPORT OF FINDING OF SURPLUSAGE.—Where the indorsements on each of the two notes signed by the defendant were to the effect that, "this note is given to protect" the payee named "from loss on account of the purchase of 1,000 shares of Red Star Gold Mining Co.'s Stock," and the payee "has the option during the life of this note of surrendering this note and keeping the 1,000 shares of stock or surrendering the stock and receiving payment on the note," it is held that a finding that such indorsements were "surplusage" is sustained by proof that the payee did not purchase or accept the shares of stock mentioned in payment of either of the notes.

ID.—LEGAL EFFECT OF INDORSEMENTS—OFFER OR OPTION TO ACCEPT SHARES IN PAYMENT IN LIEU OF COIN—EFFECT OF NOTES NOT CHANGED.—Viewing the indorsements as having been assented to by the payees, the same can only be considered as constituting in legal effect a mere offer or option tendered by the maker to the payees to accept the number of shares of mining stock mentioned therein in payment of the notes in lieu of their payment in gold coin as called for by the notes. The writing indorsed could no more affect or change the nature of the face of the notes than if it

had been committed to different pieces of paper unconnected with the notes.

ID.—ELECTION OF PAYEE TO ENFORCE NOTES—REJECTION OF OPTION—NUGATORY EFFECT UPON INDORSEMENTS.—The election of the payees to enforce payment of the notes according to the face thereof would, without regard to the position of the writing, amount to a rejection of the option, and if the note and indorsements are taken together, upon the refusal of the payees to take the stock, the notes would immediately become unconditional promises according to their tenor, and the written indorsements became nugatory and of no effect as soon as the action upon the notes was commenced.

ID.—ABSENCE OF CONDITION PRECEDENT TO ACTION ON NOTES.—Where the undisputed testimony shows that the payees had never received any shares of stock in the mining corporation, it appears that they had nothing to surrender as a condition precedent to their action upon the notes, which action of itself operated to surrender the bare right of option to take or acquire the stock.

APPEAL from an order of the Superior Court of Sierra County denying a new trial. Stanley A. Smith, Judge.

The facts are stated in the opinion of the court.

Wehe & Redding, for Appellant.

James F. Hunt, and Nilon & Arbogast, for Respondent.

HART, J.—The complaint in this action is in three counts: 1. For the sum of \$267, alleged to have been loaned by plaintiff to the defendant; 2. On a promissory note for the sum of \$500 and interest, said note having been, it is alleged, executed in favor of and delivered to plaintiff by the defendant; and 3. On a promissory note executed by defendant in the sum of \$500 in favor of one Richard Lindvall, the latter having assigned said note to the plaintiff.

The court found in favor of plaintiff on all the counts of the complaint, and thereupon caused to be entered in favor of plaintiff judgment for the sum of \$1,459.41.

This appeal is by the defendant from the order denying him a new trial.

The general contention of the appellant is that the evidence does not support the decision of the court, the action

having been tried by the court without a jury, and that errors were committed in the admission of certain evidence.

The note, as pleaded in the second count of the complaint, reads as follows:

"Alleghany, Nov. 9th, 1908.

"Six months after date I promise to pay to the order of Isaac Ostrom, Five Hundred Dollars for value received, with interest at 7 per cent per annum, from date until paid, both principal and interest payable only in United States gold coin, and in case suit is instituted to collect this note or any portion thereof — promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

L. P. WOODBURY."

The note executed by Woodbury to Lindvall and as pleaded in the third count of the complaint is in words and figures precisely the same as those of the foregoing note, the only difference being in the name of the payee.

The answer traverses the averments of the first count of the complaint and, besides, sets up a special defense thereto which need not be further noticed, since the sole complaint of appellant against the order is involved in the attack upon the rulings of the court with respect to the second and third counts.

As to the last-mentioned counts, the answer denies that the defendant executed the notes as therein declared upon and described, but alleges that each of the notes that he did execute and deliver to the respective payees named in said notes "was a conditional note, with certain conditions indorsed on the back thereof, which conditions have not been complied with," and that he is not indebted to the plaintiff on account of said notes "in any sum of money whatever, or at all."

The real point of objection to the soundness of the order denying the defendant a new trial lies in the contention, (1) that there is a material variance between the allegations of the second and third counts of the complaint and the proof offered and received in their support, and (2) that, in allowing said evidence, the court committed prejudicial error.

The note made in favor of and delivered to the plaintiff by the defendant contained, upon the back thereof, the follow-

ing: "This note is given to protect Isaac Ostrom from loss on account of the purchase of 1000 shares of Red Star Gold Mining Co.'s stock. Said Ostrom has the option during the life of this note of surrendering this note and keeping the 1000 shares of stock or surrendering the stock and receiving payment on the note." This indorsement is signed by the maker of the note, defendant herein.

The note from Woodbury to Lindvall, and which is the subject of the third count of the complaint, bears upon its back, *mutatis mutandis*, a similar indorsement.

At the trial, the defendant objected to the admission of the notes in evidence on the ground that the notes offered as evidence were not the notes pleaded. Thereupon the plaintiff offered the face of the notes in evidence, to which defendant objected on the first-mentioned ground and on the additional ground that "counsel could not offer half of a note," and "that plaintiff must recover on the notes pleaded and not upon" other contracts. The court reserved its rulings on all these objections until a later period in the progress of the trial. At the conclusion of plaintiff's testimony, the court made an order overruling the objections to the evidence referred to, and counsel for defendant thereupon moved to strike said testimony from the record upon the grounds upon which the original objections thereto were urged. The court denied this motion and the defendant thereupon rested his case without offering proof in support of the allegations of his answer or upon the merits of his special defenses to the second and third counts of the complaint.

It is clearly manifest, from the averments of the answer and the course pursued by the defendant in the trial, that the variance complained of did not actually mislead him to his prejudice in maintaining his defense upon the merits, had he chosen to press the special defenses set up in his answer upon their merits, and it is the rule in this state that where the variance is not so misleading as to prejudice a party in maintaining his action or defense upon the merits, such variance is immaterial. (Code Civ. Proc., sec. 469; 31 Cyc., p. 703, and California cases cited in the footnote.)

The defendant does not deny, but admits, the execution and delivery of certain notes to the plaintiff and his assignor, and merely denies that the notes pleaded in the com-

plaint are the notes so executed and delivered. He is, therefore, to be deemed to have known of any defense, if any, which he might have interposed against recovery upon the counts setting up the notes. Indeed, the averments of his answer, wherein he sets up an alleged special defense against the validity of the claims of the second and third counts of the complaint, are plainly affirmative of the possession of actual knowledge by him of the defense that he could, and, in fact, did by his pleading, interpose to a recovery upon the notes as pleaded in the complaint. The answer, replying to the second and third counts of the complaint, alleges as we have seen, that the notes made by the defendant in favor of Ostrom and Lindvall were "conditional notes, with certain conditions indorsed on the backs thereof, which conditions have not been complied with." The notes which were offered and received in evidence in support of plaintiff's case, bore upon their backs the indorsements referred to by the answer. How could the defendant have been misled to his prejudice in maintaining his defense, when he set up what appears to be, and evidently is, the only defense that he could plead against recovery upon the notes?

Obviously, there does not and cannot exist any ground for a diversity of opinion as to the elementary rule that the *probata* and *allegata* must correspond. And if the defendant had rested upon a mere denial of the execution of the pleaded notes, and the writing on the back of the notes actually made and delivered by him might be held to be material or as vitally affecting the nature of the instruments, he would now be in a position to claim a want of correspondence between the averments of plaintiff's complaint and the proof. But, in the place of such a course, he, as we have shown, preferred to set forth in his answer the nature of the contracts to which he really bound himself, and in so doing betrayed evidence of the only defense, if defense at all, which it was within his power to advance against the second and third counts of the complaint.

We are unable to perceive an analogy, as appellant insists exists, between the case at bar and the cases of *Owen v. Meade*, 104 Cal. 179, [37 Pac. 923], *Bailey v. Brown*, 4 Cal. App. 515, [88 Pac. 518], and *Edinger v. Sigwart*, 13 Cal. App. 667, [110 Pac. 521]. In none of those cases does the

question arise whether the answer to the complaint is such as to disclose that the defendant was or was not misled by the variance between the complaint and the evidence. In each of those cases it is merely held that the evidence failed to establish the contract as pleaded, and, of course, a judgment obtained under such circumstances would be without a prop to support it.

Moreover, the effect of the pleading of the special defenses in the answer was to aid the complaint in those particulars in which it is claimed that plaintiff's pleading is defective and to supply the omissions objected to. (*Herman v. Necht*, 116 Cal. 553, 559, [48 Pac. 611]; *Herd v. Tuohy*, 133 Cal. 55, 60, [65 Pac. 139]; *Lyles v. Perrin*, 134 Cal. 417, [66 Pac. 472]; *Daggett v. Gray*, 110 Cal. 169, [42 Pac. 568]; *Pomeroy's Remedies and Remedial Rights*, sec. 579). The answer is verified, and, as seen, the defendant therein, in effect, alleges that the notes as pleaded in the complaint were not the notes executed by him, in that it did not appear from the complaint that they bore upon their backs the written matter referred to. The averments of the answer with regard to the notes were sufficient to and did tender a clear issue upon the proposition whether the notes upon which the plaintiff declared were the notes made and delivered by the defendant.

Manifestly, under our view of the issues which were tendered by the pleadings, the rulings of the court admitting the notes in evidence were perfectly proper. But it is further objected that the court erred in permitting plaintiff and his assignor to explain the writing on the backs of the notes. If there was error in allowing some of the testimony concerning said writing, we think it was without prejudice.

The court found that the written matter on the backs of the notes was "surplusage." The finding was based upon the testimony of Ostrom and Lindvall, payees of the notes, to the following effect: That when the defendant, having previously secured a promise by Ostrom and Lindvall for a loan of \$500 from each, delivered the notes to the payees, he explained that he desired them to have some of the stock in the Red Star Gold Mining Company, and that his purpose in putting the writing on the backs of said notes was merely to thus guarantee the right to Ostrom and Lindvall to pur-

chase and acquire 1,000 shares of stock each in the corporation in the event that said mining corporation "struck it rich"; that the payees never agreed to buy stock in said corporation, never intended to do so, and never authorized the defendant to put the writing referred to on the backs of the notes; that they merely made a straight loan of the money evidenced by the notes and expected payment of the same strictly according to the terms of the face thereof. It may be conceded that some of this testimony was incompetent, still it was without prejudice, for we think the court would have been justified in making the finding referred to upon the instruments themselves and proof that the payees did not accept the shares of stock mentioned in the writing in payment of the notes. Disregarding that portion of the testimony of Ostrom and Lindvall wherein they declare that they did not consent to the writing on the backs of the notes and did not at any time consider the proposition of accepting the shares of stock in payment of the notes, and viewing said writing as having been assented to by the payees, the most that can be said of it is that, if anything at all, it constituted, in legal effect, only a mere offer or option tendered by the defendant to Ostrom and Lindvall to accept the number of shares of stock in said mining corporation mentioned in the writing in payment of the notes in lieu of their payment in gold coin, as called for by the notes. This writing could no more affect or change the nature or effect of the face of the instruments than if it had been committed to different pieces of paper, unconnected with the notes themselves. The election of the payees to enforce payment of the notes according to the tenor of the face thereof would in either case amount to a rejection of the option to take the stock or a refusal by the payees to exercise their right to do so. And, in this case, even viewing the writings on both sides of the instruments as constituting one entire contract, said instruments, upon the refusal of the payees to take the stock, would at once become what, upon their face, they purport to be and are—unconditional promises to pay the sums of money specified therein in gold coin.

According to the undisputed testimony, the payees had never received any shares of stock in the mining corporation, and, therefore, they had nothing to surrender, as a

condition precedent to their right to enforce payment of the notes in gold coin, except the bare right or option to take or acquire the stock. This right they surrendered the moment they instituted an action for a recovery upon the notes. In other words, the commencement of the action amounted to an election to reject the option and to require the payment of the notes according to the terms of the face thereof. And it was undoubtedly upon the theory as thus stated that the court found that the written matter on the backs of the notes was "surplusage"—that is, immaterial—which finding, under the view we take of the legal effect and scope of said written matter, is strictly true, since, upon the election of the payees to reject the offer thereby tendered by the defendant, said writing became, *ipso facto*, nugatory or of no effect.

We can perceive no reason for disturbing the order, and it is, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 908. Third Appellate District.—February 7, 1912.]

A. BONSLETT, Respondent, v. BUTTE COUNTY CANAL COMPANY, Appellant.

MANDAMUS—COMPELLING DELIVERY OF WATER SOLD—WRITTEN PROVISION CONTROLLING PRINTED PART.—It is held that the plaintiff is entitled to a writ of mandate to compel the delivery of water sold, under a written provision in a contract with the defendant canal company, that the water should be delivered at the highest point on the north line of the section in which plaintiff's land is situated, where it appears that the defendant has a lateral branch from its main canal extending to such highest point, and that such written provision is controlling, as against a mere printed provision, that the water should be taken from its main canal some miles distant from said section.

ID.—DEMURRER TO COMPLAINT PROPERLY OVERRULED.—A demurrer to the complaint resting on such printed provision in the contract, relied upon by defendant, was properly overruled.

ID.—RULE AS TO PARTLY WRITTEN AND PARTLY PRINTED PROVISIONS IN CONTRACT.—Where a contract is partly written and partly printed, or is written or printed under special directions of the parties to meet their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties or contract in question, the written controls the printed portions. If the two are absolutely repugnant, the printed part must be disregarded.

ID.—GENERAL RULES AS TO CONSTRUCTION OF CONTRACTS—INTENTION OF PARTIES—AMBIGUITY—EXPLANATION BY CIRCUMSTANCES.—In construing a contract, the intention of the parties is to govern, and is to be ascertained from the writing alone, if possible. Where there is ambiguity or uncertainty, the contract must be interpreted in the sense in which the promisor believed at the time of making it the promisee understood it. The contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates; and such circumstances, including the situation of the subject of the instrument and of the parties to it, may be shown, so that the judge may be placed in the position of those whose language he is to interpret.

ID.—CONSTRUCTION OF WRITTEN CLAUSE IN CONTRACT—POINT OF DELIVERY—TIME OF FIRST PAYMENT—SUCCEEDING PRINTED CLAUSE.—It is held that reading the entire instrument, and having in view the rules of interpretation, the written clause—"first payment to commence at such time as the water may be ready for delivery at the highest level on the north line of the northwest quarter of said section seven"—is to be interpreted as indicating the point of delivery of water, as well as the time when payment for the water was to commence; and that a printed clause immediately following, indicating a different point of delivery, must, if repugnant thereto, be disregarded.

ID.—PROPER EVIDENCE ADMITTED TO RESOLVE DOUBT.—It is held that any doubt as to the meaning of the terms of the contract has been satisfactorily resolved by the evidence rightly admitted for that purpose.

ID.—EVIDENCE SUPPORTING FINDINGS.—It is held that the evidence supports all of the findings made for the plaintiff and against the defendant as to the terms of the contract, as to defendant's acquiescence in and confirmation of plaintiff's construction thereof, as to defendant's ownership and control of the lateral ditch constructed by defendant to carry water to plaintiff's land, and its actual delivery through the same of all water paid for by plaintiff, and its ability to deliver all water through the same in compliance with its agreement.

APPEAL from a judgment of the Superior Court of Butte County, and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion of the court.

George F. Jones, and W. H. Carlin, for Appellant.

W. E. Duncan, Jr., for Respondent.

CHIPMAN, P. J.—*Mandamus*. Plaintiff brings the action to compel defendant to deliver water to plaintiff's land in accordance with the agreement set forth in his amended complaint. It is alleged that defendant is a corporation formed "for the purpose of appropriating and selling water for irrigation and domestic purposes in the county of Butte, . . . and of constructing and maintaining a system of canals, main branch and lateral ditches for the distribution and sale of said water so appropriated by it"; that "defendant has heretofore constructed and is now the owner of a certain system of canals, main branch and lateral ditches diverting water from Feather river and conveying the same to various points in Butte and Sutter counties"; that part of said system of canals is a certain canal which diverts water from the west side of said river, about five miles below the city of Oroville, following the contour of the country south through Butte county into Sutter county herein designated for convenience "Butte County Canal"; that, in addition to said canal, defendant is also "the owner of certain other canals, main branch and lateral ditches aggregating twenty miles in length, exclusive of said 'Butte County Canal'; and is also the owner of all the water flowing in all of said system of canals"; that defendant "is and at all of the times herein mentioned has been the owner of a certain main branch or lateral ditch designated for convenience as 'Lateral No. 6,' which said lateral diverts water from said Butte County Canal at a point (particularly describing it) and said main branch or lateral ditch extending thence in a general southwesterly direction through the lands of (describing various tracts of land), and ending on the north line of the northwest quarter of section 7, township 17 north, range 3 east, M. D. M. Said

lateral No. 6 being about four miles in length and approximately running along the high ridge south of what is known as Morrison's slough. That the southwesterly or lower end of said 'Lateral No. 6' main branch ditch is on the highest possible level on the north line of the northwest quarter of said section seven"; that plaintiff is the owner of the southeast quarter of the northwest quarter of said section 7; that, on June 29, 1904, defendant entered into an agreement with plaintiff by which defendant agreed to sell to plaintiff "such water as might be required by him to irrigate the crops of trees growing upon said lands herein described, not exceeding at any given time at a rate of one cubic foot of water per second for each one hundred and sixty acres . . . and agreed to deliver to the plaintiff the said water at the highest possible level on the north line of the northwest quarter of said section 7," a copy of which agreement is attached to the complaint as exhibit "A"; that said agreement was prepared by defendant upon a form partly printed, used and furnished by defendant, a portion of which is written, as indicated; that plaintiff has complied with each and all the terms of said agreement and is able and willing hereafter to continue to do so; that, ever since April 15, 1904, there has been a large quantity of water flowing through said Butte county canal, which quantity is and at all times herein mentioned has been sufficient to supply all consumers using water under contract with defendant, and at all said times defendant has had water sufficient to supply plaintiff for the irrigation of said land; that it is practicable to irrigate said lands from the end of said "Lateral No. 6" on the highest point on the north line of the northwest quarter of said section 7, and said water is necessary to irrigate plaintiff's said land, and defendant is able to and can, if it desires, deliver water to plaintiff at said point as specified in said agreement. Then follow averments that, on May 1, 1910, plaintiff demanded of defendant to deliver water to plaintiff as by the terms of said agreement provided, said delivery to be made on May 5, 1910; that defendant was then in a position to deliver and could have delivered, if it had desired, the water to which plaintiff was entitled under said agreement, but defendant neglected and refused to so deliver or deliver water at all to plaintiff; that unless water is immediately delivered to plaintiff at the said

point mentioned in said agreement plaintiff's crops will be damaged in the sum of \$400; that plaintiff is the party beneficially interested and has no plain, speedy and adequate remedy in the ordinary course of law, and that plaintiff has no means of irrigating said land except by and through said "Lateral No. 6," and that the law specifically enjoins upon defendant, as a public service corporation, the duty of supplying water to plaintiff as set forth in said agreement.

Defendant interposed a general demurrer to the complaint, and also demurred thereto as ambiguous in certain particulars. Demurrer was overruled and defendant answered: Admitted corporate capacity and its general purposes as alleged in the complaint; denied ownership or control of the alleged branch or lateral ditch, but alleged ownership of a canal conveying water to various points in said counties; admitted ownership of water flowing through its main canal, but denied ownership of water in any alleged branch or lateral connecting with said canal; denied the averments of the complaint as to lateral No. 6; admitted plaintiff's ownership of land as alleged and the execution of the contract of March 29, 1904, but denied that by said or any agreement it agreed to deliver water on the north line of said northwest quarter of said section 7; admitted that defendant is able and can deliver water to plaintiff at the point specified in said agreement, but denies that said point is other than a point on the line of its main canal, at which point it is alleged by defendant the agreement specifically provided that water should be delivered, and alleged its readiness to deliver water to plaintiff at said point; denied the averments of injury to plaintiff's crops and as to damage thereto; alleged that by said agreement defendant agreed to furnish water to plaintiff at a point on its main canal and not otherwise, which it is now and at all said times has been ready to do.

The court made findings substantially in accord with the averments of the complaint. In the matter of the alleged agreement the court found that prior thereto, to wit, December 2, 1903, defendant entered into an agreement with plaintiff to deliver him water "in a branch line running on the north line of the said land of plaintiff," which agreement is set forth in the findings; "that thereafter it was discovered by the parties to said agreement that it was impracticable to

run a main branch or lateral ditch upon the north line of said lands of plaintiff for the reason that said north line was lower at the northwest and northeast corner than at the point between said points; that, for the purpose of overcoming and obviating the physical difficulty preventing the defendant from delivering said water through said ditch to be run upon said plaintiff's north line, the said plaintiff and defendant entered into a further agreement of the twenty-ninth day of June, 1904," the agreement mentioned in said complaint. "That in said agreement of December 2, 1903, defendant agreed to deliver said water to said plaintiff in a lateral or main branch ditch running on the north line of said plaintiff's land. That in and by said agreement of June 29, 1904, the said defendant agreed to deliver said water to plaintiff at the highest possible level on the north line of the northwest quarter of said section 7." That the intention of the parties, by the agreement of June 29, 1904, was "to change the manner or mode of delivery of said water from delivering the same through a main branch or lateral ditch, running upon the north line of the land of plaintiff, to providing for the delivery of said water upon the highest possible level on the north line of lands of said plaintiff."

Plaintiff had judgment as prayed for with \$50 damages and costs of suit.

Defendant appeals from the judgment and from the order denying its motion for a new trial.

Defendant contends: 1. That the demurrer for insufficiency of facts should have been sustained; 2. That the court erred in admitting testimony for the purpose of construing the contract in question; 3. That plaintiff failed to prove the ability of defendant to comply with the writ prayed for.

It becomes necessary to set forth so much of the agreement of June 29, 1904, as will illustrate the points made by the parties respectively. It consists of a printed form, used by defendant, in which certain portions are written, which latter will be indicated by italics. It purports to have been made by defendant as first party and plaintiff as second party:

"Witnesseth: That for and in consideration of the mutual covenants and considerations herein set forth, the parties hereto mutually agree, that is to say, the party of the first part agrees, to furnish to the party of the second part from

its system of canals, to be constructed by it, all the water that may be required (not exceeding at any given time at the rate of 1 cubic foot per second for each 160 acres), for the purpose of irrigating the following described lands, to wit:

"The southeast quarter of the northwest quarter of section seven (7) in township seventeen north, range three east, containing forty (40) acres of land, in the county of Butte, state of California.

"The party of the second part, A. Bonslett, hereby reserves the right to re-locate water on any other forty (40) acres in the northwest quarter of said section seven (7) at any time prior to the use of water.

"First payment to commence at such a time as water may be ready for delivery at the highest possible level on the north line of the northwest quarter of said section seven (7).

—from the time of the completion and delivery of water in the main canal of said system to such a point as is most convenient for the delivery of water in same for use on said lands, at which point the said party of the second part agrees to take and receive such water.

"The party of the first part agrees to place a suitable gate (if there is not already one there), in the bank of said canal or a main branch thereof, at the point at which water is to be delivered to the party of the second part.

"The party of the second part shall construct a ditch from said gate to said land at his own risk, cost and expense, and shall maintain and keep in repair the same; and it is further agreed that said ditch so constructed and maintained may, at the option of the party of the first part, become a branch ditch of the said party of the first part and be under its control; in such event it shall have the right to use and enlarge such ditch, provided such use shall not interfere with the flow of water to said land. And the party of the second part hereby grants to the party of the first part rights of way over and through said land, with right of entry thereon for the purpose of constructing, using and repairing ditches, canals, pipes and flumes across said land, and the flowing of water in a practical and customary manner, including all privileges necessary or convenient to the full enjoyment of said right of way; said rights of way, and uses to be used with due regard for the rights of the party of the second part.

"It is understood and agreed that the water covered by this agreement shall not be used by the party of the second part on any lands except those herein described, nor shall the same be by him permitted to go to waste or be discharged upon other lands; . . .

"The party of the second part, in consideration of the construction of said main canal, and ditch rights and delivery of water agrees to pay annually to the party of the first part, at its office, in gold coin of the United States, on the first day of September of each and every year hereafter, the sum of *sixty (60) Dollars*, (that is to say at the rate of \$1.50 per acre annually), the first annual payment hereunder to become due and payable on the first day of September in the year in which water is first delivered at said gate, and shall be paid annually thereafter; . . .

"It is further agreed, that the party of the first part may shut off the water for the purposes of general or special repair of its canals or ditches, dams, gates, etc., in the fall of any year and at such other times as urgent necessity may require; but shall restore the water in said canals or ditches as speedily as possible, the conditions, circumstances and requirements considered.

"If at any time the quantity of water flowing in the main canals shall be less than the full capacity thereof, each piece of land covered by water contracts with the party of the first part shall be entitled only to its proportional share of the water then flowing. . . . "

Certain rules are found in the codes, bearing upon the contentions of the respective parties, which must be borne in mind. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity (Civ. Code, sec. 1638); and, subject to certain other rules, the intention of the parties is to be ascertained from the writing alone, if possible (Id., sec. 1639). The whole of the contract is to be taken together, each clause helping to interpret the other (Id., sec. 1641). A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates (Id., sec. 1647). Where there is ambiguity or uncertainty, the contract must be interpreted in the sense in which the promisor believed, at the time of making it, the promisee under-

stood it. (Id., sec. 1649.) Where a contract is partly written and partly printed, or is written or printed under special directions of the parties, to meet their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties or contract in question, the written controls the printed parts. If the two are absolutely repugnant, the printed part must be disregarded (Id., 1651). The circumstances under which the contract was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret. (Code Civ. Proc., sec. 1860.)

Each party contends that the agreement is free from ambiguity and uncertainty and that its intention is plainly to be ascertained from its language and needs no interpretation. Unfortunately, the parties disagree radically as to the intention said to be imported so plainly by the language. The only conclusion to be derived from these conflicting views is that there must be ambiguity or uncertainty in this plain language, else two diametrically contrary results could not be reached from it, namely, by plaintiff, that defendant was to deliver water at the highest point on the north line of the said northwest quarter of section 7; by defendant, that it was to be delivered at a point on its main canal some miles distant from plaintiff's land. If forced to reach a conclusion from the language of the agreement alone, we think the more reasonable interpretation would be that given by plaintiff. Reading the entire instrument and having in view the rules above stated, we should feel inclined to interpret the written clause—"first payment to commence at such time as water may be ready for delivery at the highest possible level on the north line of the northwest quarter of said section seven"—to indicate the point of delivery of water as well as indicating the time when payment for water was to commence. The clause immediately following is the provision on which defendant relies, but it is part of the printed portion of the contract and must be harmonized with the written part, or, if repugnant thereto, must be disregarded. One thing is clear to our minds, namely, that if there was uncertainty it was as to the point where the water was to be delivered by defendant. It agreed to deliver water to plaintiff "from its

system of canals . . . for the purpose of irrigating the following described lands." It agreed to place a gate for plaintiff's use "in the bank of said canal, *or a main branch thereof*, at the point at which water is to be delivered to" plaintiff. The clause—"from the time of the completion and delivery of water in the main canal of said system to such point as is most convenient for the delivery of water in same for use on said lands"—is printed and is not connected with what precedes it in a way to show what is meant, and is in fact an incomplete sentence. It is not probable that plaintiff would have surrendered a contract more favorable to him and have agreed to pay for water delivered some miles from his land and without any apparent means of bringing it to his land, but defendant claims such to have been the agreement. There is certainly room for grave doubt as to the contract's having such meaning. This doubt was satisfactorily resolved by the evidence which we think was rightly admitted.

It appeared that, in December, 1903, a contract was made with plaintiff by the agent of defendant and in its behalf, by which, as found by the court, defendant agreed to deliver the water contracted for "in the main branch running on the north line of said place (plaintiff's land) of said system to such a point as is most convenient for the delivery of water in same for use on said lands, at which point the said party of the second part (plaintiff) agrees to take and receive such water." The finding of the court as to this contract and the reason given for making a new one is supported by the evidence. Plaintiff testified that at the time the second contract, June 29, 1904, was entered into it was represented to him that defendant would deliver the water at the highest point on the north line of the northwest quarter of section 7. At that time neither the lateral nor the main canal had been completed. Later the canal was completed and a ditch constructed to the point named, called "Lateral No. 6," and on through plaintiff's land. Defendant sent statements to plaintiff for rental for 1905, 1906 and 1907, which he ignored. He was called to defendant's office, and he then told defendant that he would pay for water when delivered to him, whereupon he was informed that the defendant would do so and, shortly after, plaintiff received the water at the point claimed by him as agreed upon and he paid defendant for water thus

delivered for 1908 and 1909. This was an acquiescence in and confirmation by defendant of plaintiff's construction of the contract.

Upon the question of ownership or control of lateral No. 6, there was evidence that it was constructed by labor paid for by defendant, and we have seen that defendant so far controlled it as to deliver water to plaintiff through this lateral. Defendant introduced no evidence on any issue. We think the finding on the question of defendant's ownership or control of this branch ditch finds support in the evidence.

Defendant admits its liability to furnish all the water it agreed to deliver, its claim being that it was to be delivered at its main canal. That it did deliver water to plaintiff through the lateral No. 6 and collected rentals for the service is shown without conflict, and there was evidence from which the inference was justified that defendant has the ability, if so minded, to now comply with its agreement as the trial court found it to be.

The demurrer rested on defendant's construction of the contract, and, as we think such construction unwarranted, the demurrer was rightly overruled.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 896. Third Appellate District.—February 7, 1912.]

EMILY B. KELLEY, Respondent, v. H. C. LONG,
Appellant.

LANDLORD AND TENANT—RULE AS TO FORCIBLE EVICTION FROM SUBSTANTIAL PART OF PREMISES INAPPLICABLE TO INSIGNIFICANT PART.—The rule that if a tenant is forcibly evicted by the landlord from a substantial part of the demised premises, and the lease is not terminated, there can be no apportionment of rent, and the tenant cannot be compelled to pay the rent reserved, and that an actual ouster is not necessary to constitute an eviction, since any act of the lessor which results in depriving the lessee of the beneficial enjoyment of the premises will constitute an eviction, does not apply when it does not

appear that the interference has resulted in depriving the lessee of a substantial, as distinguished from an insignificant or inconsequential, portion of the demised premises.

ID.—ACTION FOR RENT—POSSESSION OF LESSEE NOT CHANGED—TRESPASS UPON APPURTENANT WATER RIGHT—DAMAGES—RENT NOT EXTINGUISHED.—Where it appears that the lessee sued for rent was at all times in the actual possession and occupancy of the premises and of the water rights appurtenant thereto, except that it is found that a comparatively small portion of the water was wrongfully taken with the knowledge and consent of the lessor, on or about April 1st of one year, and that the damage resulting therefrom could be measured in money was the sum of \$40 only, which was deducted from the rent reserved, it is held that the act of interference amounted to no more than a mere trespass, and that there was no eviction from a substantial part of the premises that could extinguish the rent.

ID.—CONSISTENCY OF FINDINGS—MERE PASSING TRESPASS NOT INCONSISTENT WITH POSSESSION.—Since no mere passing trespass amounts to an interference with possession, the finding that the defendant had the sole and exclusive possession of the demised premises and the appurtenant water rights is not in conflict with the finding that a third party named, with the knowledge and consent of the plaintiff, interfered with said water rights, to defendant's detriment in a specified sum awarded to defendant, on one occasion only.

ID.—SUPPORT OF FINDING AS TO TRESPASS—CONFLICTING EVIDENCE—RESPONDENT NOT ENTITLED TO RELIEF.—It is held that, although there is some evidence urged by respondent which might have sustained a finding that the third person named had the right to divert a portion of the water for use on his land during defendant's term as lessee, yet as there is some evidence supporting the finding that he was a trespasser, and not authorized to use any part of the water, this court cannot change the finding, and that the respondent, not having appealed, is not in a position to ask for such relief.

APPEAL from a judgment of the Superior Court of Lassen County. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

Rankin & Julian, for Appellant.

F. A. and E. A. Kelley, for Respondent.

HART, J.—This is an action for the recovery of rent alleged to be due the plaintiff from the defendant under the

terms of a certain lease executed by the plaintiff and one E. A. Kelley of a tract of land known as the "Kelley Ranch," and situated in Lassen county.

(E. A. Kelley, subsequently to the execution of said lease, conveyed and transferred to plaintiff all his interest in the demised premises.)

The complaint prayed for judgment in the sum of \$454.34, but the court, by which the action was tried, a jury having been waived by the parties, awarded judgment in the sum of \$414.34.

This appeal is prosecuted by the defendant from the judgment, supported by a bill of exceptions.

By the lease the lessors demised to the defendant the land therein described, together with the appurtenances thereto, for the term of five years, commencing on the first day of March, 1908, at the yearly rental of \$500 in United States gold coin, to be paid as follows: \$250 on or before the first day of March, and \$250 on or before the first day of October, of each and every year "during the five year term of this lease, as aforesaid."

The gravamen of the complaint is that the defendant has paid the sum of \$45.66, only, on account of said rent for the year commencing on the first day of March, 1909, and that there is, therefore, a balance due and owing plaintiff from defendant on account of the rent for said year, the sum for which plaintiff prays judgment.

Among other covenants of said lease is the following: "That the said second party, paying the said rent and performing said covenants and promises, shall and may at all times peaceably have, hold and enjoy the said premises, without any manner of let, suit, trouble or hindrance of or from the said first parties or any other person whomsoever."

The answer admits the execution of the lease as alleged in the complaint; denies that any balance is due plaintiff from defendant on account of the rent referred to in the complaint, and then, as a special defense, and upon which a counterclaim in the sum of \$717.80 is set up, the answer, in substance, alleges: That, in connection with the demised land, there are certain water rights and ditches from Susan river, which said water rights are exclusive to the use of said real property and

under the ownership and control of the lessors; that the land in question is suitable for and adaptable to agricultural purposes when properly irrigated and watered by means of the water rights and ditches in connection therewith; that defendant entered into the possession and occupancy of said land and the water rights appurtenant thereto, "believing that he had the sole and exclusive right to use such water and water rights for the purposes of irrigation on the said Kelley Ranch; that he thereupon planted crops on said premises and property and prepared to irrigate and cultivate and properly harvest the same"; that, about the first day of April, 1909, one F. H. Shanks, then in possession of and occupying a portion of the "Kelley Ranch," known as the "Frank Kelley place," without the consent of the defendant, "and with the knowledge and consent of the plaintiff herein took the possession and control of all the water and water rights appurtenant to and connected with said leased premises and interfered with defendant's use of the same and hindered and prevented said defendant from using the said water for irrigation purposes on said leased premises"; that thereafter, and during the irrigating season of 1909, said Shanks, "without the consent of defendant and with the full knowledge and consent of the plaintiff herein, notwithstanding the covenants and agreements on the part of plaintiff in said lease contained, was permitted and allowed by said plaintiff to continue in the possession of said water and water rights and to use the same in such manner as to hinder and prevent said defendant from harvesting his crops or from making proper or any use of said water upon said leased premises." It is then alleged that the damage to the defendant by reason of the aforesaid acts of said Shanks, with the knowledge and consent of the plaintiff, amounted to the said sum of \$717.80.

The court found that the defendant, on the first day of March, 1908, by virtue of the lease referred to by the complaint, went into the possession and occupancy of the demised premises and "he ever since has been and still is in possession and occupancy of the same as such lessee, together with the water and water rights appurtenant thereto and used in connection therewith; that during all of said time said defendant had the sole and exclusive possession and right of possession of said premises and water rights and had the sole

and exclusive right to use such water and water rights for irrigation purposes on said Kelley Ranch''; but the court found further that, about the first day of April, 1909, F. H. Shanks did interfere with the defendant's use of a portion of the water and water rights referred to in the answer, and that such interference was with the knowledge and consent of the plaintiff and resulted in damage to the defendant in the sum of \$40. The court, however, found that said water and water rights were not interfered with by Shanks, with the knowledge and consent of plaintiff, subsequent to the first day of April, 1909, as charged in the answer, and that the defendant did not suffer damage in the sum of \$717.80, as alleged by him. The court concluded as a matter of law that the plaintiff was entitled to judgment in the sum sued for, minus the sum of \$40, found to be the extent of the damage sustained by the defendant by the acts of Shanks with the consent of the plaintiff.

The main contention of the appellant is that the act of the plaintiff in consenting to the use of the water and water rights appurtenant to the demised premises by Shanks and the latter's use thereof or interference therewith, with plaintiff's consent, amounted to an eviction of plaintiff from the demised premises and, therefore, destroyed the right of plaintiff to the rent reserved by the lease.

The rule invoked and sought to be applied in this case by appellant is thus stated in the syllabus in the case of *Skaggs v. Emerson*, 50 Cal. 3: "If a tenant is forcibly evicted from a *substantial* part of the demised premises by the landlord, and the lease is not terminated, but the tenant still continues to occupy, under the lease, the part of which he retains possession, the tenant cannot be compelled to pay the rent reserved, for, in such case, there can be no apportionment of rent." And it is not necessary that there should be an actual ouster to constitute an eviction, for any act of the lessor which results in *depriving the lessee of the beneficial enjoyment of the premises* will constitute an eviction. (*Agar v. Winslow*, 123 Cal. 587, 593, [69 Am. St. Rep. 84, 56 Pac. 422]; *Camarillo v. Fenlon*, 49 Cal. 202; *Skaggs v. Emerson*, 50 Cal. 3; *Levitzky v. Canning*, 33 Cal. 299.)

But we think the rule as stated does not apply where it does not appear that the interference has resulted in depriving the

lessee of a *substantial* as distinguished from an insignificant or inconsequential portion of the demised premises, or, in other words, in depriving him of the beneficial enjoyment of a *substantial* portion of the premises. In nearly all the cases cited by appellant and to which we have referred it will be found that the interference by the lessor resulted in depriving the lessee of the right to collect and receive the rents from subtenants before the termination of the lease. Such an act would, of course, amount to an eviction, and the rule relied upon by appellant would apply.

But, in the present case, the lessee was at all times in possession and occupancy of the premises and the water rights appurtenant thereto, except, according to the findings, a comparatively small portion of the water which, it was found, was wrongfully taken, with the knowledge and consent of the lessor, by Shanks, on one particular occasion during the year 1909—on or about April 1st of that year. That the *portion* of the water and water rights with which Shanks wrongfully interfered was inconsequential and did not disturb the defendant's beneficial enjoyment of a substantial portion of the demised premises, is shown by the finding that the damage to the defendant resulting from such interference, measured in money, amounted to the sum of \$40 only. Obviously, if the interference with defendant's possession was no more serious than that finding indicates (and the sufficiency of the evidence to justify the findings is not challenged here), the act of Shanks can amount to no more than a mere trespass. And it is the settled rule that no acts of "molestation, even if committed by the landlord himself or by a servant at his command, amount to a breach of the covenant, unless they are more than a mere trespass." (Taylor's Landlord and Tenant, 9th ed., sec. 309, and cases cited.) The defendant, at all times, enjoyed possession and occupancy of these premises, including the water rights, and had and exercised full and exclusive use of the water, except the trifling portion of which he was deprived by the act of Shanks on a single occasion. It most certainly cannot be justly said that this act amounted to an eviction of the defendant from a substantial portion of the demised premises, and should, therefore, operate as a suspension or extinguishment of the rent. (Taylor's Landlord

and Tenant, sec. 309; *Oglive v. Bull*, 5 Hill (N. Y.), 54.) A mere passing trespass cannot operate to so oust a tenant of his possession as to amount to an eviction or a dispossession.

The foregoing views constitute, we think, a sufficient answer to the further contention of the appellant that the findings are inconsistent and contradictory, in that finding 3, by which the court finds that the defendant had the sole and exclusive possession and occupancy of the premises and water rights appurtenant thereto is in direct conflict with finding 7, whereby the court finds that Shanks, with the knowledge and consent of plaintiff, interfered with said water rights to the detriment of the defendant. If, as we have held, the act of Shanks, with the consent of the plaintiff, as found by finding 7, was a mere trespass, then the finding that the defendant had the "sole and exclusive possession of the premises" at all times, is strictly true.

Counsel for the respondent insists that there is no evidence which justifies the finding of the court that the defendant was damaged in the sum of \$40 and asks that the judgment be so modified as that the plaintiff may be awarded the full amount sued for. While there is evidence in the record from which, apparently, the court would have been justified in educing a finding that the defendant accepted the lease with a full understanding that Shanks had always used some of the water from the ditches and would be entitled to a certain share thereof during the defendant's term, still we cannot say that there is not some evidence that supports the finding which, in effect, declares that he was not authorized or entitled to use any portion of said water. It is, of course, an obvious proposition that a court of review cannot change a finding of a trial court where there is any evidence that justifies and supports it. Moreover, not having taken an appeal, the plaintiff is not in a position to ask for such relief.

So far as we are able to judge from the record before us, the judgment was legally awarded, is just, and should not, therefore, be disturbed. It is accordingly affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 228. Second Appellate District.—February 8, 1912.]

**In the Matter of the Application of FRANCISCO GIANNINI
for a Writ of Habeas Corpus.**

CRIMINAL LAW—POWER OF COURT TO SUSPEND SENTENCE FOR MAXIMUM TERM.—A court has power, under section 1203 of the Penal Code as amended in 1911, to place a defendant upon probation for the full maximum term of sentence provided for the offense of which he is convicted, and when a defendant is placed on probation without limitation of time, the same extends to such maximum term of sentence, and no longer.

CONSTRUCTION OF STATUTE—POWER OF SUSPENSION NOT LIMITED BY FAILURE OF COURT TO PLACE DEFENDANT IN CARE OF PROBATION OFFICER.—It is held that the proper construction of the statute is that absolute power of suspending sentence is given by such section of the Penal Code as amended, and that where a court acts under the statute, within the limits thereof, such order of suspension is not invalidated because the court omits a duty imposed by law upon it to place the party in charge of a probation officer. The functions of the probation officer are not to hold the defendant in custody, but to exercise a supervisory control over his conduct as an arm or instrument of the court.

ID.—SENTENCE NOT INTRUSTED TO PROBATION OFFICER—COMMITMENT UPON REVOCATION OF SUSPENSION.—The legislative intent that no part of the sentence is included within the period of the probation officer's surveillance is apparent when it is considered that upon the revocation of the original order of suspension, the law permits the commitment of the defendant for the full term of the sentence as originally pronounced. The statute confers the power of revocation and modification upon the court for any cause which to the court is good and sufficient.

ID.—REVOCATION OF SUSPENSION ESSENTIAL TO POWER OF COMMITMENT. The court having, by its judgment, suspended the execution of the sentence under the statute, and having jurisdiction so to do, the same became an operative judgment of court, and so remains until revoked or modified by an order regularly made; and in order that the court should possess the power to issue a commitment to one whose sentence had theretofore been suspended, a revocation or modification of the order of suspension is an essential prerequisite.

ID.—COMMITMENT BY JUSTICE OF PEACE—AFFIRMATIVE SHOWING OF REVOCATION OF SUSPENSION REQUIRED—ABSENCE OF INTENDMENTS. Where the order of suspension of sentence was made by a justice of the peace, no intendments can be made in favor of a subsequent

judgment of commitment made by him, under the sentence; but his jurisdiction to make it must affirmatively appear; and where the record does not disclose that any modification or revocation was ever made by the justice, the commitment by him was without authority of law, and the prisoner's detention thereunder was unlawful.

ID.—HABEAS CORPUS.—The commitment being invalid, the prisoner is entitled to be discharged from custody thereunder upon writ of *habeas corpus*.

ID.—CODE PROVISION NOT CONFLICTING WITH EXECUTIVE AUTHORITY OF GOVERNOR.—Section 1203 of the Penal Code, as now existing, regulating the suspension of sentences, and the power of commitment thereafter under the sentence, does not interfere in any way with the functions and duties of the governor of the state.

APPLICATION for discharge upon writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Flint, Gray & Barker, H. B. McClure, H. T. Miller, and G. W. Zartman, for Petitioner.

Frank Lamberson, District Attorney, and James M. Burke, Deputy District Attorney, for Respondent.

THE COURT.—Petitioner on the tenth day of June, 1911, entered a plea of guilty to the charge of unlawfully selling intoxicating liquor contrary to the provisions of an ordinance of Tulare county. The court thereupon adjudged that, as punishment for the offense committed, "the said defendant Francisco Giannini do pay a fine of seventy-five dollars, and in case said fine is not paid within one hour from the time of rendering judgment, that you, Francisco Giannini, defendant, be imprisoned in the county jail of the county of Tulare, state of California, until the fine be duly satisfied, in proportion of one day's imprisonment for every dollar of the fine, or until lawful payment shall have been made of such proportion of said fine as shall not have been satisfied by imprisonment, at the rate above prescribed. And it is further ordered by this court, that the defendant Francisco Giannini be imprisoned in the county jail of the county of Tulare, state of California, for the term of ninety days, and this latter sentence is suspended during the good behavior of defendant Francisco

Giannini, and any violation made by defendant in future, commitment will issue for this imprisonment. Done in open court this 10th day of June, 1911." Thereafter, on the twenty-eighth day of November, 1911, the justice of the peace issued a commitment commanding the sheriff forthwith "to take, arrest and safely keep and imprison the within named Francisco Giannini in the county jail of said county of Tulare until said judgment shall have been satisfied as therein prescribed." Petitioner was thereupon taken into custody upon said commitment, and he seeks a discharge from such custody by reason thereof. The return of the officer justifies the detention of petitioner based upon the commitment so issued.

The question presented upon this application is as to the validity of such commitment. Petitioner's chief contention is that, under the provisions of section 1203, Penal Code, as amended April 6, 1911 (Stats. 1911, p. 689), the power of the court to suspend sentence, or to revoke probation and execute the original sentence, cannot extend beyond the period of time fixed by the court as the sentence, and that more than ninety days having elapsed between the date of the sentence and the issuance of the commitment herein, the court no longer possessed power to direct the commitment of petitioner. With the general proposition, that the power of the court to issue a commitment cannot extend beyond the time of the sentence fixed by the court, we do not agree. Section 1203, Penal Code, as so amended, provides: "The court, judge or justice thereof, may suspend the imposing, or the execution of sentence, and may direct that such suspension may continue for such period of time, not exceeding the maximum possible term of such sentence, and upon such terms and conditions as it shall determine, which terms and conditions may include, in the discretion of the court, the requirement of bonds for the appearance of the person released upon probation before the court, at any time that the court may require such appearance in the investigation of any alleged violation of said terms and conditions of probation, and such bonds may be at any time by the court exonerated without affecting any of the other terms or conditions of such probation; and in case of such suspension of imposition or execution of sentence, the court shall place such person on probation and under the

charge and supervision of the probation officer of said court, during such suspension, or under the charge and supervision of the probation officer of the county in which such probationer is by the court permitted to reside." The offense with which petitioner was charged being a misdemeanor as declared by the ordinance, the possible maximum term of sentence, assuming that section 19 of the Penal Code applies to the violation of an ordinance, is six months' imprisonment. That, in our opinion, is the maximum possible term of sentence; that it is competent for a court to impose any sentence of imprisonment less than this maximum term, and, notwithstanding such fixation, to place the defendant upon probation for the full maximum term, and that when a defendant is placed on probation without limitation of time, the same extends to such maximum term of sentence and no longer. It follows, then, that if all other proceedings of the justice were regular, he possessed authority under the law to place petitioner upon probation for the full period of six months. Respondent's contention, however, is that the court possessed no power under the statute to place a party upon probation, except in instances where the party is placed in the hands of a probation officer, and that the order of the court should so specify; in other words, that the mode prescribed by the statute is the measure of the power of the court. We think a proper construction of the statute is that absolute power of suspending sentence is given by this section, and that where a court acts under the statute, within the limits thereof, such order of suspension is not invalidated because the court omits a duty imposed by law upon it: namely, to place the party in charge of a probation officer. The functions of the probation officer are not to hold the defendant in custody, but to exercise a supervisory control over his conduct as an arm or instrument of the court. The legislative intent that no part of the sentence is included within the period of the probation officer's surveillance is apparent when it is considered that upon revocation of the original order of suspension the law permits defendant's commitment for the full term of the sentence as originally pronounced. The court having by its judgment suspended the execution of this sentence under the statute, and having jurisdiction so to do, the same became an

operative judgment of court and so remains until revoked or modified by an order regularly made. This statute confers the power of revocation and modification upon the court for any cause which to the court is good and sufficient; but that a court should possess the power to issue a commitment for one whose sentence had theretofore been suspended, a revocation or modification of the order of suspension is an essential prerequisite. No intendments being in favor of the judgment of a justice, his authority to issue a commitment must affirmatively appear. The record does not disclose that any such modification or revocation was ever made by the justice in the case of petitioner, and the commitment was, therefore, in our opinion, issued without authority of law and the prisoner's detention thereunder unlawful.

We think it unnecessary to distinguish the cases of *In re Collins*, 8 Cal. App. 367, [97 Pac. 188], and *In re Moore*, 12 Cal. App. 161, [107 Pac. 129]. These cases, and those of the supreme court upon which they are based, were all constructions of section 1203 of the Penal Code prior to the amendment of 1911, before which date no power of suspension of sentence after judgment was given the court; hence, it followed that an attempt at suspension was void and the defendant was properly treated as an escape, or as one having consented to a delay in the issuance of the execution. Since the adoption of the amendment above cited, the power of a court to suspend sentence after judgment cannot be questioned.

We are not of opinion that section 1203, Penal Code, as now existing, interferes in any way with the functions and duties of the chief executive of the state. We think it competent for the legislature, and an exceedingly wise provision, to confer upon the courts this power of suspension of sentence to be exercised in proper instances, and that its enactment in no wise impairs the functions of a co-ordinate branch of the government.

Many other points are presented, but entertaining the views hereinbefore expressed, a discussion thereof is unnecessary.

No authority for the issuance of the commitment appearing, the same is invalid, and the prisoner is ordered discharged from custody.

[Crim. No. 232. Second Appellate District.—February 8, 1912.]

THE PEOPLE, Respondent, v. NOEL WRIGHT, Appellant.

CRIMINAL LAW—SEDUCTION UNDER PROMISE OF MARRIAGE—ESSENTIALS OF OFFENSE—SEDUCTION BY MARRIED MAN—IGNORANCE OF MARRIAGE ESSENTIAL.—Before the crime of seduction as defined by section 268 of the Penal Code is made out, it must appear that the prosecutrix has relied upon the promise of the accused that he will marry her. If the accused is a married man, it must appear that he seduced her under a promise of marriage, she not knowing that he has a wife, in which case the illegality of his promise does not excuse him; but if at the time of giving her consent she knew that the man was married, she is not excused for the surrender of her chastity to him by reliance upon his illegal promise.

ID.—CONFLICTING EVIDENCE AS TO KNOWLEDGE OF MARRIAGE—PREJUDICIAL ERROR IN REFUSING INSTRUCTION.—Where, upon a prosecution for seduction, the evidence is conflicting upon the question whether or not, at the time of the commission of the alleged offense, the prosecutrix knew that the defendant was a married man, it is prejudicial error, amounting to a miscarriage of justice, to refuse to instruct the jury that if the prosecutrix knew at such time that the defendant was married, she was not justified in relying upon his promise to marry her.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Henry C. Gesford, Judge presiding.

The facts are stated in the opinion of the court.

Lewis H. Smith, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

JAMES, J.—Defendant was convicted of the crime of seduction and sentenced to serve a term of imprisonment in the state penitentiary. He appeals from that judgment and from an order made by the trial court denying his motion for a new trial. At the time of the commission of the alleged offense defendant was a married man and the prosecutrix was a young woman who had theretofore resided with her father

near Sanger in the county of Fresno. The father of the prosecutrix, before the alleged seduction of his daughter had been accomplished by defendant, received information that defendant was a married man and so informed the daughter. At the trial the young woman testified that notwithstanding the fact that she had been assured by her parent that defendant was a married man and had been forbidden to keep company with him, she had failed to obey the injunction of her father and had later submitted to an act of sexual intercourse with the defendant because the latter assured her that, while he had been previously married, a divorce had been granted to him and that he would marry the prosecutrix on a very early day. Defendant testified that he had always told the prosecutrix that he was married, but that he intended to get a divorce from his wife, whom he claimed had deserted him. It was clear from the evidence that the relations of defendant with the prosecutrix had been illicit, and it was further made clear by the testimony that the defendant, prior to the time when the first improper act was committed between the two, had promised to marry the young woman. On his part it was asserted that this promise was made upon the condition that it would be fulfilled when he secured a divorce from his wife, and upon the part of the prosecutrix it was affirmed by her in testimony that, notwithstanding the reports made to her that defendant was then a married man, she had relied upon his declaration expressed to her that he was not then married but had already been divorced, and that in submitting herself to his embraces she relied upon his promise that he would and could immediately thereafter enter into an engagement of marriage with her. Under this state of the evidence the defendant asked the court to charge the jury that if the prosecutrix knew at the time of her alleged intercourse with defendant that defendant was a married man, she was not justified in relying upon the promise of marriage as an inducement persuading her to submit herself to him. This instruction was offered in several forms, and the trial judge refused to give it in any of those forms, and failed to give any other instruction covering the same matter to the jury. While the court permitted evidence to be introduced on both sides of the question as to whether or not at the time of the alleged seduction the prosecutrix knew defendant to be a

married man, the jury was left wholly without any direction as to the responsibility of defendant to the law as dependent upon the finding that it might make upon that particular question of fact. Before the crime of seduction, as defined by section 268 of the Penal Code, is made out, it must appear that the prosecutrix has relied upon the promise of the accused that he will marry her; if such prosecutrix at the time knows that the promise so made cannot be carried out, as that the accused is a married man, then she is not warranted in relying upon such a representation. As was said in the case of *People v. Kehoe*, 123 Cal. 224, [69 Am. St. Rep. 52, 55 Pac. 911]: "Thus, if a married man seduces a woman under promise of marriage, she not knowing that he has a wife, his promise is illegal and invalid, but this fact does not excuse him. The woman, in ignorance of the fact, was justified in relying upon that promise; but if, at the time of giving her consent, she knew the fact to be that the man was married, and that, therefore, the promise was necessarily conditional upon the death or the putting away of his present wife, so base a contract would not excuse her in law for the surrender of her chastity. The contract itself would be void as against public policy, and the woman's reliance upon it could not be extenuated or excused." Under the entire charge as given by the court to the jury in this case, the latter might well assume that the defendant could be properly convicted notwithstanding the fact that the prosecutrix may have known at the time of the alleged seduction that defendant was a married man. By the failure of the court to declare the law as embodied in the instructions offered by the defendant on this subject, there was withdrawn from the jury an issue of fact vital to a determination of the charge against the defendant and which might have, under the testimony, produced a verdict in his favor. Upon this state of the case, it is very clear to us that the error was such as has resulted in a miscarriage of justice.

The judgment and order are reversed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 900. First Appellate District.—February 8, 1912.]

**SAN FRANCISCO MERCANTILE UNION, a Corporation,
Appellant, v. J. H. W. MULLER, Respondent.**

**PROMISSORY NOTE—CONSIDERATION—RELEASE OF MAKER AS SURETY ON
CONTRACTOR'S BOND BY OWNER—LIENS—SUBSEQUENT SETTLEMENT.**

Where the owner of a building released the defendant from liability on the contractor's bond in consideration of his note given at the time when there were mechanics' liens under the contract, aggregating nearly three times the amount of the note, it was supported by a sufficient consideration, which was not affected by the subsequent fact that a settlement effected by the owner of the building with the lien claimants enabled the owner to secure the completion of the building at the original contract price.

ID.—COMPROMISE OF DOUBTFUL CLAIM—SUFFICIENT CONSIDERATION.—

The compromise of a doubtful claim is a valid consideration for a promise or a new contract; and where at the time of the giving of the promissory note sued upon, in consideration of a release of liability upon the bond, it was uncertain what the defendant's liability upon the bond might be, the note was given and received in compromise of a doubtful claim, and is supported by a sufficient consideration.

ID.—FINDING AGAINST CONSIDERATION OF NOTE UNSUPPORTED.—It is held that the finding of the court, that the defendant as maker of the note received no consideration therefor, is unsupported by the evidence.

ID.—CLAIM OF FRAUD IN NOTE—DEFENSE NOT PLEADED.—In order to support the claim that the note was procured by fraud, one relying thereon must specially plead the fraud, and it is a sufficient answer to such claim that no such defense was pleaded.

ID.—BOND NOT ORIGINALLY VOID—COMMON-LAW BOND.—The claim that the bond was originally void as one given under section 1203 of the Code of Civil Procedure is held not supported by the record, but that the bond is clearly a valid common-law bond given for the protection of the owner.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Maurice R. Carey, for Appellant.

William J. Herrin, for Respondent.

HALL, J.—This is an appeal by plaintiff from a judgment in favor of defendant.

Plaintiff sued on a promissory note executed by defendant to one Jacob Gorfinkel and by him assigned to plaintiff.

Defendant admitted the execution of the note, denied the assignment to plaintiff, and pleaded that there was no consideration for the note. The court found in favor of plaintiff as to the assignment, but found that defendant received no consideration for the execution and delivery of said note, and for that reason gave judgment for defendant.

It is insisted by appellant that the evidence does not support the finding that defendant received no consideration for the execution and delivery of the note, and this presents the only matter to be determined upon this appeal.

We think the contention of appellant must be sustained.

It is shown without dispute that one Lena Sander Hare let a contract to one Bell, whereby he agreed to erect a building for her for the sum of \$5,450. This contract was dated October 29, 1908, on which day it was filed in the office of the county recorder.

The said Bell, as principal, and said defendant Muller and one Smith, as sureties, executed to said Lena Sander Hare a bond for the faithful performance of said contract, whereby they bound themselves unto Lena Sander Hare as owner and sole obligee in the sum of \$1,350 that said Bell would construct and complete said building in accordance with the terms of said contract, and would deliver said building to said Lena Sander Hare free from all liens, claims or other encumbrances for which said Bell might be responsible. Bell commenced the construction of the building under the contract, but after receiving payments under his contract to the amount of \$2,000 he abandoned the same. Lena Sander Hare, through her attorney Maurice Carey, immediately notified defendant of the abandonment of the contract by Bell, and Muller for a time considered the proposition of completing the building himself, but in the meantime mechanics' liens under the Hare-Bell contract, aggregating close to \$1,700, were filed for record in the office of the county recorder. This fact was also communicated to Mr. Muller. Finally Mr. Carey, as the attorney for Mrs. Hare, sent Jacob Gorfinkel, who was connected with

the office of Mr. Carey, to effect a settlement with Mr. Muller of his liability upon the bond. Gorfinkel called upon Muller, informed him that the liens against the building amounted to \$1,600 and some odd dollars, and that he and the other bondsman were "stuck" for it. Gorfinkel pressed for a settlement of the matter, and finally (and this is from Muller's own testimony) Muller said, "I will compromise with \$600." Accordingly defendant gave to Gorfinkel the note in suit, and took from him the following:

"Fitchburg, Cal., June 10, '09.

"Received of J. H. W. Muller his promissory note for six hundred dollars in full payment and release of his obligation on that certain bond signed by him and Frank Smith jointly as surety for the performance of contract entered into between William Bell and Lena Sander Hare, building contract No. J 19250, filed October 29, 1908.

"MAURICE R. CAREY,

"Attorney for Lena Sander Hare,

"By JACOB GORFINKEL."

There being some doubt as to the authority of Gorfinkel, it was agreed that the settlement was to be subject to the approval of the real party in interest.

Subsequently she ratified the settlement as follows:

"San Francisco, Cal. August 18, 1909.

"Mr. Maurice Carey, City.

"Dear Sir:—You are hereby permitted to accept for me the note of J. H. W. Muller, as given to Jacob Gorfinkel on June 10, 1909, the same to be a full release of Mr. Muller's obligation to me on the bond for the construction of Bell-Hare contract; and if you see fit to take the same, in accordance with your wishes, I hereby sell, assign and transfer all my interest in said note to the San Francisco Mercantile Union, a corporation.

"Very truly yours,

"LENA SANDER HARE."

Mr. Muller was notified by Mr. Carey, as the attorney for Lena Sander Hare, of her ratification of the settlement.

Lena Sander Hare succeeded in letting another contract for the completion of the building for the sum of \$2,950, which, added to the sum of \$2,000 paid Bell, the original contractor,

made the sum of \$4,950, which was \$500 less than the original contract price. She also succeeded finally, but not until six months after the date of the note in suit, in effecting a compromise and settlement of the claims of lien filed under the Hare-Bell contract for \$500.

It thus appears that the building finally cost her no more than the original contract price, and it seems to be for this reason that respondent claims that the note in suit was without consideration.

But the note was given in settlement of respondent's obligation upon the bond. As consideration for the execution of the note respondent was given a release of his obligation under the bond, and at the time of the giving of the note it was uncertain what respondent's liability upon the bond might be. The note was given and received in compromise of a doubtful claim. The compromise of a doubtful claim is a valid consideration for a promise or new contract. (*Witmer Bros. v. Weid*, 108 Cal. 569, [41 Pac. 491]; *Racouillat v. Sansevain*, 32 Cal. 376; *Swem v. Green*, 9 Colo. 358, [12 Pac. 202]; *Denney v. Parker*, 10 Wash. 218, [38 Pac. 1018]; *White v. Pacific States S. L. & B. Co.*, 21 Utah, 23, [59 Pac. 527]; *Schmidt v. Demple*, 7 Kan. App. 811, [52 Pac. 906].)

In the case at bar the settlement and compromise was effected at a time when respondent's liability under the bond was undetermined. The settlement was ratified by Lena Sander Hare, and she became bound thereby. (*Denney v. Parker*, 10 Wash. 218, [38 Pac. 1018].) The subsequent settlement of the claims of lien for a sum which enabled her to secure the completion of the building at a cost not exceeding the original contract price does not establish that there was no consideration for the note. (See cases above cited.)

Some suggestion is made in respondent's brief to the effect that the note was procured by fraud. It is sufficient to say that no such defense was pleaded. One relying upon the defense of fraud in the procurement of a contract must specially plead the fraud. (*Witmer Bros. Co. v. Weid*, 108 Cal. 569, [41 Pac. 491]; *California Steam Nav. Co. v. Wright*, 8 Cal. 585; *McCreary v. Marston*, 56 Cal. 403.)

Neither is there anything in the record to support the theory that the bond was originally absolutely void, as one given

under section 1203, Code of Civil Procedure. The bond is clearly a common-law bond given for the protection of the owner.

As the finding that the respondent received no consideration for the execution of the note is not supported by the evidence, the judgment must be reversed, and it is so ordered.

Kerrigan, J., and Lennon, P. J., concurred.

[Civ. No. 856. Second Appellate District.—February 8, 1912.]

A. C. WAGY, Respondent, v. ROBT. ATKINSON, Appellant.

ACTION FOR BALANCE DUE ON NOTE—SALE OF COLLATERAL STOCK—MARKET VALUE STATED BY PLEDGOR—PRESUMPTION OVERCOME BY FINDING.—In an action for the balance due on a promissory note, after the sale of stock pledged as collateral security therefor, which the payee was authorized to sell in the market after the maturity of the note without demand, advertisement or notice, the plaintiff being authorized to purchase at the sale, it is held that any presumption that the stock was sold at the market value expressed by the owner when the collateral was deposited is overcome by the finding that a sale for a less sum was *bona fide*, and was for an adequate and highest obtainable price.

ID.—SUFFICIENT COMPLAINT—GENERAL FINDING—SUPPORT OF JUDGMENT. Where the complaint states a cause of action, a general finding that all of the allegations of the complaint are true, and that all of the allegations of the answer and cross-complaint of the defendant are untrue, sufficiently supports the judgment for the plaintiff.

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Hutton, Judge.

The facts are stated in the opinion of the court.

F. E. Davis, and J. W. Cochran, for Appellant.

Isidore B. Dockweiler, for Respondent.

ALLEN, P. J.—Action upon a promissory note. The complaint alleged the execution by defendant to plaintiff of a

promissory note set out in the complaint, attached to which note was an agreement in substance to the effect that 5,000 shares of mining stock, "the market value of which is now \$650," had been deposited with plaintiff as collateral security for said note; that the right reposed in plaintiff to call for additional security, and that failure to respond forthwith to such call matured the obligation, and on the nonpayment of the note when due authority was given plaintiff to sell any securities so held as collateral, without demand, advertisement or notice, and the plaintiff was authorized to buy the same, and, after deducting legal costs and expenses of collection, was required to apply the proceeds of such sales to the amount due on the obligation; and the maker of the note agreed to pay the holder any deficiency upon demand. It is alleged that after the maturity of the note plaintiff sold 13,000 shares of mining stock for \$104, the same being held as collateral for such obligation; that no part of the interest on said note had been paid, and after applying the credit of \$104 there remained unpaid the sum of \$496, the balance of the principal of said note, payment of which had been demanded before suit was brought. Judgment was prayed accordingly. The answer denied the execution of the note; denied any consideration therefor; alleged that the whole transaction was a gambling transaction; denied that the stock was sold for \$104; denied that the sale was *bona fide* or for the value thereof, alleging it was an illegal and fraudulent transaction, and denied that there was anything unpaid upon the note. By way of cross-complaint, defendant sets up facts tending to show a conversion of the 13,000 shares of mining stock, and he asks judgment for the value thereof. There was an answer filed to this cross-complaint, denying all of the allegations thereof. Upon the trial the court found that every allegation contained in plaintiff's complaint was true, and that each and every denial contained in the answer of defendant, and in the separate answer and cross-complaint filed by defendant, is untrue and incorrect. Judgment was accordingly rendered for plaintiff. From this judgment defendant appeals.

Appellant contends that the collateral contract shows that the stock was of the value of thirteen cents a share when

deposited, and that the presumption of law is that the stock was sold at the same market value as that given it by the contract. Whatever presumption may attach, the same is overcome by the finding of the court, presumably upon competent testimony, that the stock was sold for a certain fixed sum, and that the sale was *bona fide* and for an adequate and highest obtainable price. This finding the court makes in response to the allegations of the answer. The complaint was sufficient to state a cause of action. The general finding that all of its allegations were true, and that all of the allegations of the answer and cross-complaint were untrue, were and are sufficient to support the judgment.

We see no merit in the appeal, and the judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 837. Third Appellate District.—February 8, 1912.]

ELEANOR SOPHIA SILVERSTON, Appellant, v. MERCANTILE TRUST COMPANY OF SAN FRANCISCO, a Corporation, MARY GRAY TOBIN and JOSEPH S. TOBIN, Respondents.

FORMER JUDGMENTS INVOLVING VALIDITY OF TRUST—ACTION TO PARTITION TRUST FUNDS—INVALIDITY INVOLVED—ESTOPPEL.—Judgments in former actions, in one of which successors of a deceased trustee of an express trust were appointed, in a second of which the successor of a resigning trustee was designated, and in a third of which it was sought to obtain an accounting of trust funds and a partial distribution according to the terms of the trust, and in each of which the validity of the trust was necessarily involved and passed upon, are conclusive as an estoppel in a subsequent action to partition the entire funds between the claimants thereof on the ground of the invalidity of the trust.

12.—CODE RULE AS TO ESTOPPEL OF FORMER JUDGMENT.—The elementary rule as to the estoppel of a former judgment is stated in section 1911 of the Code of Civil Procedure: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto."

ID.—PLEA OF FORMER JUDGMENTS IN ANSWER IN PARTITION—EFFECT OF STIPULATION—VALIDITY EXPRESSLY ADJUDICATED.—Where the judgment-rolls in each of the former actions were set forth in the answer to the complaint in partition, and it was stipulated between the parties that the judgment-rolls therein pleaded were properly set forth, it must be accepted as true as alleged in the answer that the existence and validity of the trust was put in issue and adjudicated in each of said actions.

ID.—RECORD UPON APPEAL—CONTEST OF FORMER ACTIONS—PRESUMPTIONS—GROUND OF CONTEST—FINDING—PERFORMANCE OF COURT'S DUTY. Where the record upon appeal shows that each of the former actions was contested by appellant, it must be presumed, in the absence of any counter-showing, that they were contested on the ground of invalidity of the trust, and that the court expressly found in favor of its validity. It must be presumed that the court in the conduct of each of the actions performed its manifest duty to determine the validity of the trust which it sought to enforce, and to avoid any illegal or abortive act in enforcing a void trust.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Hillyer, Stringham & O'Brien, for Appellant.

Platt & Bayne, and Richard Bayne, for Respondents.

BURNETT, J.—The action is in partition. Appellant states that "there is practically no controversy as to the facts." The amended complaint alleges that plaintiff and defendant, Mary Gray Tobin, are the owners as tenants in common of certain personal property consisting of notes and bonds; that the Mercantile Trust Company of San Francisco claims some interest adversely to plaintiff, but that it is without right. The answer denies that plaintiff and said defendants are the owners or tenants in common or otherwise of the property and admits that the said Mercantile Trust Company claims an interest in the property adverse to plaintiff, but denies that such claim is without right. It is alleged in the answer that the property is held in trust by said company as follows: That on the fifteenth day of August, 1893, the plaintiff, defendant, Mary Gray Tobin, and Edwin R. Dimond, together with their father, W. H. Dimond, entered into an

agreement with Horace G. Platt, which is set forth as exhibit "A," according to the terms of which said Platt was to receive certain real and personal property belonging to W. H. Dimond and to his three children, in trust for said children during the term of their lives, applying the income to their use and support, and to "give and convey" one-third of said property to E. R. Dimond upon the death of said W. H. Dimond, and, upon the death of either of the daughters, "to give and convey" one-half of the remaining two-thirds to the devisees and legatees or heirs of the one so dying. On August 16, 1893, another agreement was made whereby W. H. Dimond succeeded Horace G. Platt as trustee under the same trust; that said W. H. Dimond died on or about the eighteenth day of June, 1896, without having appointed his successor in said trust either by will or deed; that thereafter Edwin R. Dimond and the Union Trust Company of San Francisco, as executors of the last will and testament of said W. H. Dimond, brought an action in the superior court in and for the county of San Francisco, against plaintiff herein, her husband, Paul R. Jarboe, Mary Gray Tobin and her husband, Joseph S. Tobin; that in the complaint therein the execution of said deed of trust referred to as exhibit "A" and also the execution of the deed of trust from said Platt to W. H. Dimond and also the death of said Dimond without having appointed a successor were alleged and set forth, and the prayer was that the court appoint a successor in said trust to said W. H. Dimond and that the plaintiffs as said executors be authorized to turn over to said trustee so appointed by the court the property set forth in said deeds of trust; "that Eleanor Sophie Jarboe (the plaintiff herein) appeared in said action and contested the same; that said action was tried upon its merits; that the court filed its findings of fact and conclusions of law and found that all the allegations of the complaint were true, and that a judgment and decree should be entered adjudging that said W. H. Dimond was the trustee under said trust, and that Horace G. Platt and B. P. Oliver should be appointed trustees in place of said W. H. Dimond, deceased, with all the powers, duties, liabilities and obligations set forth in said trust as incumbent upon and belonging to the trustee under said trust, and thereupon the court duly made, gave and entered its judgment and decree appointing

Horace G. Platt and B. P. Oliver trustees in the place and stead of W. H. Dimond, deceased, as trustees under said trust, with all the powers, duties, liabilities and obligations set forth in said trust as incumbent upon and belonging to the trustee under said trust"; that they accepted the trust and so entered upon the discharge of their duties; that certain other actions were brought, in which plaintiff herein was a party, relating to this trust property; that they were contested by plaintiff herein and tried upon their merits and judgment rendered therein. The answer further alleges that the action is barred by the laches of plaintiff and by the provisions of section 343 of the Code of Civil Procedure. Furthermore, it is averred that "The same cause of action at issue in this action, to wit, the validity of said trust above set forth, was duly adjudged and decided in said three actions above mentioned and set forth, to wit, said action brought by said executors of the will of W. H. Dimond, and said action brought by this plaintiff and others against said trustees and executors of the will of W. H. Dimond, deceased, and said action above set forth brought by said trustees against this plaintiff and others; that this plaintiff appeared in each of said actions and contested the same; that said three actions were heard and decided upon their merits, and that in each of said three actions the trust herein set forth was in issue and was adjudged and decided to be valid." The judgment-roll in one of these actions, No. 24,203, entitled *Edwin R. Dimond and Union Trust Company, etc., v. Eleanor Sophia Jarboe and others*, "and also the judgment-roll in No. 24,202, entitled *Horace G. Platt and B. P. Oliver as trustees, v. Eleanor Sophia Jarboe, and others*," were received in evidence. It is stipulated by the parties hereto, as stated by appellant, that the statements appearing in the answer to the amended complaint as to the contents of the record in the two actions just mentioned are substantially correct statements of the contents of the said judgment-rolls and are sufficiently detailed for the purposes of this appeal. From said statement it appears specifically that in the first above-mentioned case the court found, among other things, as hereinbefore stated, that "Horace G. Platt and B. P. Oliver should be appointed trustees in place of said W. H. Dimond, deceased, with all the powers, duties, liabilities and obligations set forth in said trust as incumbent upon and

belonging to the trustees under said trust, and that said parties, under and by virtue of said judgment and decree, accepted said trust and entered upon the discharge of their duties as such trustees under said trust, as successors to said W. H. Dimond, with all the rights, powers, duties and estate held or enjoyed by said W. H. Dimond as such trustee as aforesaid." In the second of these cases the court found all the allegations of the complaint to be true, which included the averment of the institution of an action by said Eleanor Sophia Jarboe, Paul R. Jarboe, Mary Gray Tobin and Joseph S. Tobin against Horace G. Platt and B. P. Oliver as trustees, and the Union Trust Company of San Francisco as executor of the last will of decedent, and the rendering of a judgment therein, adjudging and decreeing what part of the money in the hands of the defendants constituted a portion of the principal sum of said trust property and what part constituted the income of said trust property collected by said W. H. Dimond, and directing the distribution of these funds in accordance with the terms of said trust, one-fourth of the income fund being distributed to said Eleanor Sophia Jarboe. It was further alleged in the complaint that said action was heard and decided upon its merits, that the court found all of the allegations of the complaint therein to be true, and that the account of said trustees was correct as set forth in the complaint, and that all of the acts of the trustees as set forth in the complaint were done within the line of their duty as such trustees, and that the court found as a conclusion of law that said account should be settled and allowed as presented, and that the resignation of said Horace G. Platt be accepted and that he be discharged from all further liability under said trust, and that B. P. Oliver be adjudged to be the sole and surviving trustee under said trust and that a decree was entered accordingly. It thus appears that an action was brought by appellant herself, in connection with others, for the purpose of enforcing the particular trust by compelling the division of some \$22,000 recovered from the executors of the estate of said W. H. Dimond, deceased, as a part of the trust estate, and that the money was actually divided and distributed according to the terms of said trust. It is declared by respondent that "It would be difficult indeed to show more clearly than has been here done that the exist-

ence of this trust had been directly involved in the litigation above referred to and its validity adjudicated and established." Further, it is argued that, since it appears that appellant contested each of the actions whose judgment-rolls were introduced herein in evidence and the particular grounds of her contest are not set forth, we must assume that one of the grounds was that such trust was invalid. It is claimed that this follows from the presumption that we must indulge in favor of the judgment of a court of general jurisdiction, that the burden, in other words, is upon appellant to show that said contest did not in fact involve directly the determination of the validity of said trust. The familiar doctrine is invoked, as stated in *Bliss v. Sneath*, 119 Cal. 526, [51 Pac. 848], that: "When a judgment of the trial court is brought here for review, it is incumbent upon the appellant affirmatively to show some reversible error committed by that court. If the appeal is presented upon the judgment-roll, the error must appear on the face of the record. Not only will error never be presumed, but every presumption will be indulged in favor of upholding the judgment."

On the other hand, it is the contention of appellant that estoppel upon a different cause of action only extends to matters actually litigated and determined and not to questions involved and defenses which might have been, but were not, made. And that it must appear from the record affirmatively that such question was raised and litigated in order to preclude the losing party from contending to the contrary in another suit. As authority for this position, the principal cases cited are: *Cromwell v. County of Sacramento*, 94 U. S. 351, [24 L. Ed. 195], *Freeman v. Barnum*, 131 Cal. 387, [82 Am. St. Rep. 355, 63 Pac. 691], and *Ephraim v. Pacific Bank*, 136 Cal. 646, [69 Pac. 436]. In the first, the question was whether or not the validity of certain bonds or coupons could be attacked, the claim being that the plaintiff was barred by the judgment in an action brought by the plaintiff on earlier maturing coupons on the same bonds and the court, through Mr. Justice Field, said: "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every other ground which might have been presented, is strictly accurate, when applied to the demand or

claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. . . . On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

In the Freeman case, *supra*, the said opinion of Judge Field is cited with approval, and it is held that this rule "applies to the question as to the constitutionality of subdivision 36 of section 25 of the county government act of 1893. It is true that matter was necessarily involved and must have been determined before judgment could have been entered in the former suit. But it does not appear from the record that such question was raised and litigated. This being a different action upon a different cause of action, the defendant is not estopped from raising the objection."

In *Ephraim v. Pacific Bank*, 136 Cal. 646, [69 Pac. 436], the judgment was held not to constitute an estoppel for the reason that the issue raised in the second action was not a material issue raised in the first action, and was not necessarily involved in the determination of the first trial, as appears from the following quotation from the decision: "The defendants (in the first action), without any just reason, set up the contract or agreement as herein alleged, *but being outside the issues* and not passed upon by the court below, it is not *res judicata*. The elementary rule in this class of cases is stated in section 1911 of the Code of Civil Procedure: 'That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.' It is evident that the liability of defend-

ants does not appear to have been adjudged upon the face of the decree settling the account, nor was their liability actually or necessarily included therein."

But, accepting appellant's view of the law of estoppel as applied to judgments, supported, it may be said, as that view is by the Freeman case, *supra*, that a judgment is conclusive only as to the material matters which appear on the face of the record to have been actually determined, still it does not follow that this particular finding of the lower court lacks sufficient support. To the contrary, we must hold that the validity of the said trust was directly put in issue and determined in the former actions. This follows from the stipulation that the answer of respondent herein contains a correct statement of the contents of the judgment-roll in each of said actions. It must be accepted as true, therefore, as alleged in said answer, that the existence and validity of said trust were put in issue and adjudicated. Of course, there is no legal objection to giving effect to this stipulation of the parties, and the case is no different from what it would be had the entire judgment-roll in said actions been incorporated in the bill of exceptions and in the pleadings therein should be disclosed a specific averment as to the validity of said trust, followed by an affirmative finding thereon by the court. Indeed, we have a right to assume that such would appear from a full exposition of said judgment-rolls, but that they were omitted in consequence of said stipulation.

But if we have given this stipulation a wider scope than was intended by the parties, nevertheless, by virtue of the presumption suggested by respondent, we must uphold the finding of the lower court. As we have seen, it appears that appellant contested each of the actions the judgment-rolls in which were introduced in evidence in this case and were before the trial court. It does not appear what the grounds of contest were. There is nothing in the record before us to negative the assumption that one of the grounds of said contest was the invalidity of said trust. Since the record does not purport to set forth all the findings of the court in said actions, we may assume also that the validity of said trust was expressly found. If the contrary be the fact, appellant should have exhibited it in the record.

But aside from the foregoing, it is apparent that appellant's position is entirely untenable. The rule as to estoppel by judgment is not correctly stated in the Freeman case, *supra*. The learned justice who wrote the opinion apparently overlooked the latter part of section 1911 of the Code of Civil Procedure. That section furnishes the presumption or rule of evidence for our guidance in ascertaining what has been determined by a judgment. We are not limited to that "which appears upon its face to have been so adjudged," but the judgment also embraces whatever is actually and necessarily included therein or necessary thereto. Parties are therefore estopped, by a former judgment, from contending for the contrary, not only as to the matters which appear to have been determined but also as to those which were necessarily involved therein or necessary thereto. For this doctrine there is abundance of support. Indeed, most of the cases go so far as to hold that there is an estoppel as to all the matters that might have been litigated in the former action. It is not necessary, however, to go to that extent to uphold the finding of the lower court upon this point.

In *Wolverton v. Baker*, 98 Cal. 632, [33 Pac. 732], it is said: "Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have through negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

In *Flynn v. Hite*, 107 Cal. 455, [40 Pac. 749], it is held, as stated in the syllabus, that: "The validity of a lease which might be shown in evidence in support of a plea of right of possession in an action of ejectment is adjudged against by the recovery of the plaintiff in the ejectment suit; and the

failure of the defendant to offer the lease in evidence in support of the plea cannot affect the conclusiveness of the judgment against his right to recover damages for not being permitted to occupy the premises recovered in the ejectment suit."

In *Crew v. Pratt*, 119 Cal. 149, [51 Pac. 42], it is said: "It may be stated as a general proposition, that a judgment is conclusive, not only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided. (Freeman on Judgments, sec. 253; *Parnell v. Hahn*, 61 Cal. 131; *Lillis v. Emigrant etc. Co.*, 95 Cal. 553, [30 Pac. 1108]; *Wolverton v. Baker*, 98 Cal. 631, [33 Pac. 731]; *Howell v. Budd*, 91 Cal. 342, [27 Pac. 747]; *Burns v. Kennedy*, 108 Cal. 338, [41 Pac. 458]; *Estate of Hudson*, 63 Cal. 457.) . . . The subject matter upon which the court was called to act in the present instance was the settlement of the final account and distribution of the estate of O. C. Pratt, under his last will. As an incident of this duty, it devolved upon the court to determine whether or not there was a valid trust created by the will and whether the respondents were lawfully created the trustees thereof. The court could not dispose of this question without passing upon the validity of the trust. It was the fulcrum upon which that branch of the case turned. . . . In the present case, we are of opinion it was, under the law, the duty of the court to adjudicate the question of the validity of the Pratt trust, and that having done so and adjudged it to be valid, while its conclusion was erroneous and the judgment open to reversal on appeal, yet as no appeal was taken therefrom and as the time therefor has long since expired, it is not now open to attack."

In *Bingham v. Kearney*, 136 Cal. 175, [68 Pac. 597], it was held that a judgment in a former action foreclosing a contract of sale for default of the purchaser in payment of purchase money, which has become final, is conclusive against the right of the purchaser to maintain a subsequent action to rescind the contract of sale and to recover back the purchase money paid, the court saying: "It is the rule, long recognized in this country, that a judgment between the same parties is conclusive, not

only as to the subject matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case, the presumption being that all such issues were met and decided." The rule is reaffirmed in *Ivancovich v. Weilenman*, 144 Cal. 757, [78 Pac. 268]; *Estate of McDougald*, 146 Cal. 195, [79 Pac. 878]; *Swamp Land Reclamation District v. Blumenberg*, 156 Cal. 539, [106 Pac. 389]. See, also, the late case of *Gibbs v. Peterson*, [Dec. 16, 1911], 13 Cal. App. Dec. 751,* where the rule is again announced and other supreme court decisions are cited in its support.

It seems entirely clear that, in the actions for the appointment of a trustee under the trust and for an accounting and distribution of the trust fund, the validity of said trust was necessarily involved. The manifest foundation for such action is the existence and legal effect of the trust. Its validity may not have been questioned; it may have been conceded by all parties; the court may have given it little consideration, but it is indisputable that the determination of its validity is inseparably associated with the judgments to which we have referred. It would be a grave reflection upon any court to suggest that it would appoint a trustee to carry out the provisions of a purported trust without inquiry as to its validity and without being satisfied that it is legally operative. There is, manifestly, no authority for the appointment of a trustee to carry out the provisions of a void trust or to determine the existence of a trust fund and direct its apportionment and distribution in accordance with the terms of such trust. We must assume that the court would, if possible, avoid any such illegal and abortive act, and that it would preliminarily determine that the contemplated proceeding was legal as being based upon a valid declaration of trust. At least, such is manifestly its duty, and we must hold that it was performed.

The estoppel was properly pleaded; it was established by the record of the former actions, from which it appears that the validity of said trust now assailed by appellant was necessarily involved in the judgments rendered in those actions;

*This case was ordered transferred to the supreme court after judgment in the district court of appeal.

and, under the authorities, it must be held that the question is *res adjudicata*.

We deem it unnecessary to notice other points made by respondent in favor of the judgment, as we feel satisfied that the finding as to estoppel is correct and is decisive of the controversy.

The judgment is affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 888. Third Appellate District.—February 8, 1912.]

IDA LOUISA EMILIA BOHN, Respondent, v. ROBERT GUNTHER, Appellant.

ACTION TO QUIET TITLE—DEED OF GIFT TO PLAINTIFF—DELIVERY—PRESUMPTION—SUPPORT OF FINDING AND JUDGMENT.—Where the plaintiff in an action to quiet title produces a deed of gift to her from the defendant, she has the right to rely upon the presumption of its delivery from the fact of her possession, unless overcome by counter-evidence; but where in addition to her own testimony as to its delivery, the presumption was also strongly fortified by the positive testimony of a number of other witnesses, a finding of such delivery is amply supported by the evidence, and is sufficient to sustain the judgment rendered in her favor.

ID.—JUDGMENT FOR LIFE ESTATE IN DEFENDANT WITHIN JURISDICTION—TITLE IN CONTROVERSY—PLEADINGS.—Where, in the action to quiet title, the title was in controversy, and each party sought to quiet title, and to cancel a deed, and there is sufficient evidence, including the testimony of the plaintiff and defendant, corroborated by correspondence, as well as by the terms of the deed of gift, making it evident that it was distinctly understood that defendant was to have the use and enjoyment of the property during his life, and that plaintiff was to have the fee subject to such life estate, the court had jurisdiction in equity to determine the true estates of the respective parties, and to find and adjudge the title in plaintiff, subject to such life estate, though not specially referred to in the pleadings.

ID.—WHOLE TITLE IN CONTROVERSY INCLUSIVE OF PART.—Since the whole of the title in controversy includes a part thereof, it cannot be said that the finding of a life estate in the defendant is entirely outside of the matter alleged in the pleadings of the respective parties in the action to quiet title as framed therein.

ID.—JUST AND EQUITABLE JUDGMENT.—It is held that, accepting the facts found, as must be done under the established rule applicable to appellate tribunals, the judgment of the lower court as rendered for each party is not only amply sustained, but is eminently just and equitable.

APPEAL from a judgment of the Superior Court of Humboldt County. Geo. D. Murray, Judge.

The facts are stated in the opinion of the court.

J. N. Gillett, F. A. Cutler, and Gillett & Cutler, for Appellant.

Mahan & Mahan, Otto C. Gregor, and George W. Hunter, for Respondent.

BURNETT, J.—The record contains evidence of the following facts: In 1853 the defendant left Germany, his native land, and, coming to the United States, located in the city of Cleveland, Ohio. There he became well acquainted and friendly with another German by the name of Bodenstein, the grandfather of Ida Bohn, the plaintiff herein. She and her parents since birth had lived in Cleveland. Defendant came to California in 1858, and, in 1860, located on the land in dispute, known as Gunther's Island. Upon returning to Germany in 1893 he stopped at Cleveland for the purpose of visiting his friend, Bodenstein, and there he became acquainted with Mr. and Mrs. Bohn and their daughter Ida, plaintiff herein. He formed an attachment for the girl and he concluded that it would be a good plan to get the Bohns to permit him to take Ida to California and to make her home with him, his purpose being to adopt her as his child and thereby enable her to inherit his property. He was a bachelor, and there was no one about him for whom he had any special fondness. Prior to 1900 some friendly correspondence passed between him and Mrs. Bohn in which he expressed his desire to have her daughter Ida come to California to make her home with him. The parents objected to this. In 1900 he made a trip to Cleveland and spent nine weeks at the home of the Bohns. On one occasion he put his hand upon Ida's shoulder and told her that he had come to Cleveland

for the purpose of taking her with him to California, and, before leaving for home, he told her parents that he would see them all in California before a great while. After returning to Eureka further correspondence ensued between him and Mrs. Bohn in which he urged her to persuade Mr. Bohn to dispose of his property there and come to California. In 1901 the Bohns did dispose of their property at a sacrifice, he being engaged in the mercantile business, and they came to Humboldt county, with the understanding that the realty herein involved should become the property of plaintiff. Among the letters from Mr. Gunther to Mrs. Bohn was one dated Eureka, December 21, 1899, which expresses clearly his sentiments toward plaintiff and his purpose in relation to the property at that time. In the letter, among other statements, he used this language: "Ever since I came from Europe six years ago, I have been thinking what to do with my property in case I die. My half-brothers and sisters would be glad if I died, so that they could get my money and I do not intend that they shall get it. . . . Last year I built a new house, and I have been thinking what would become of that house if the people I have, left me, and I have thought of Ida ever since we moved in the house. . . . I was confident you would not object if I adopted Ida as my daughter since she would be your child as much as she ever was, nor could I think more of Ida after adopting her than I do now, but I would have the consolation to know that my property after I die would not be ate up by lawyers, or go to parties who do not deserve it." In the same letter he wrote to Ida: "Why I was so anxious that you should come now, I have explained to your mother. You may not be able to judge of the matter now as well as in later years, but in the end you will find that if my plans do not succeed my intentions were good." Some time after the Bohns arrived in Eureka and were living on the island, the defendant made this statement to Mrs. Bohn: "Now, I will have to get this fixed up for Ida; I want to get that all fixed right, these dizzy spells may come over me at any time, and my money would go where I wouldn't want it to, and I am going to look after that." Shortly after the Bohns arrived, defendant asked plaintiff how she spelled her name. He made no explanation at that time, but later he gave her

a little blue slip of paper reciting the fact that he had made a deed in her favor to the island property, to be delivered upon his death, and placed it in escrow with one G. R. Georgeson. The slip contained the words: "Deed left with G. R. Georgeson, and acknowledged by George T. Rolley," and the date of the deed was given, and at the time the slip was delivered, defendant said to plaintiff: "If anything happens to me, in case of my death, you just give this little slip of paper to Mr. Georgeson, and he will give you the deed." This deed was dated August 19, 1901, and it is spoken of as the escrow deed. Other deeds were also executed, but we need not trace the history of the various transactions. The action was brought to quiet title and to cancel a deed to defendant bearing the date of February 10, 1904, and signed and acknowledged by plaintiff one week later, and recorded by defendant on the eleventh day of January, 1905, it being alleged in the complaint that said deed was signed and acknowledged with the express understanding that it "was not to be delivered or become operative except and only in the event that said plaintiff died during the life of said defendant"; and, furthermore, that said defendant, "in violation of said understanding and agreement had between plaintiff and defendant in relation to said instrument, obtained possession of said instrument and unlawfully appropriated said instrument and in violation of the confidence and trust reposed in said defendant by said plaintiff and without her knowledge or consent recorded said instrument." Defendant filed an answer and cross-complaint in which there is a positive denial that plaintiff is or ever was the absolute owner of the property, or that there was any such agreement as set forth in the complaint in relation to said deed of February 10, 1904, or that he surreptitiously or in violation of any confidence obtained possession of it, and it alleges misrepresentations and fraud on the part of plaintiff whereby defendant was induced to execute a deed to plaintiff on the eighth day of September, 1903, and another on February 9, 1904. The cross-complaint recites fully the purpose and understanding as to these instruments and the said escrow deed of August 19, 1901, and avers that plaintiff, wrongfully and maliciously and with intent to cheat and defraud defendant and secretly and without the knowledge or consent of defendant, obtained possession of the last-named

deed and, "upon the thirty-first day of March, 1905, the date of the commencement of this action, said plaintiff wrongfully, unlawfully and without right placed said escrow deed of record." Defendant therefore prayed for the cancellation of said escrow deed and for a decree quieting his title to the property. A jury was called at the trial, and they made certain special findings that were adopted by the court, which are directly opposed to appellant's theory of the case as outlined in his cross-complaint. They found that the plaintiff made no fraudulent representations nor false statements to defendant, that she did not (as alleged in the cross-complaint) conspire or design to bring about an estrangement in the relations between defendant and his niece, Martha Gunther. They answered "No" to the question: "Did Robert Gunther make, execute and deliver to Ida Bohn the deed dated September 8, 1903, and known as the life estate deed, solely for the purposes of discouraging or preventing any contest or litigation against his estate by his niece Martha Gunther, by making it appear that the record title to the property therein described stood in plaintiff?" They answered "Yes" to this interrogatory: "Did Robert Gunther execute and deliver to Ida Bohn the deed dated September 8, 1903, and referred to as the life estate deed, freely and voluntarily and not by reason of false and fraudulent misrepresentations made by Ida Bohn to Robert Gunther?" They found that Robert Gunther did "execute and deliver to Ida Bohn the deed dated February 9, 1904, and spoken of as the absolute deed, freely and voluntarily and not by reason of false or fraudulent misrepresentations made by Ida Bohn to Robert Gunther"; that it was the understanding of both parties at the time that Ida Bohn signed and acknowledged the deed from her to Robert Gunther, dated February 10, 1904, that said deed should not become operative unless Ida Bohn should die before Robert Gunther. As to this last an additional finding was made by the court that "The deed signed and acknowledged by plaintiff to defendant, bearing date February 10, 1904, was not delivered by plaintiff to defendant."

As to the foregoing findings, it may be said that there is, in our judgment, abundant evidence to support each of them, as set forth in the brief of respondent, but we pass them by without further notice and proceed to consider other findings

which are decisive of the whole controversy. These are special issues, No. 4, answered "No" by the jury, and No. 5, answered "Yes," and adopted by the court, and finding No. 8, made by the court of its own motion. These findings are to the effect that "neither Ida Bohn nor any other person acting in her behalf took the deed made by Robert Gunther to Ida Bohn, bearing date August 19, 1901, and spoken of as the escrow deed, from the possession of Robert Gunther without right, wrongfully, secretly and without the knowledge and against the consent of Robert Gunther," and furthermore, that this deed "was delivered by Robert Gunther to Ida Bohn on the stairway at his house on the twentieth day of February, 1904," or some time thereafter; "that the deed made by Robert Gunther to Ida Bohn bearing date August 19, 1901, was by said Gunther given as a deed of gift to said Ida Bohn on the twentieth day of February, 1904, or within a short time thereafter, with the intention on his part to thereby deliver the said deed to her and thereby pass the title from him to her so that said lands should become the property of said Ida Bohn, subject to the right of the defendant to have the use of and the income from said lands for and during the term of his natural life." There is no contention of any undue influence or of any unsoundness of mind on the part of defendant. It is manifest, therefore, that these findings as to the delivery of said escrow deed by defendant to plaintiff, if supported by the evidence, justify the judgment in favor of plaintiff, as they relate to a time subsequent to the other transactions to which we have referred. This deed was prepared by defendant, all in his own handwriting, as the testimony shows. It was in the possession of Mr. Georgeson for a long time, but defendant finally took it and placed it with his papers in his room at his home on the island. After the execution of the said deed of February 9, 1904, defendant had a conversation with plaintiff in reference to this transaction and he said to her: "You are with the Mahans and tomorrow morning when you go over there you tell the Mahans everything we have done, and if they can suggest anything that will be more secure, I will do anything, for I want you to have the place and I never want you to be bothered." She had a conversation with the Mahans, as directed, and she re-

ported it to Mr. Gunther. He became angry in reference to a statement made by the Mahans that he might take the deed and record it, and he said to her: "Well, do they think I am a child? This is no child's play. When I give a thing I give it. You never saw me take back a present yet." She is corroborated in this by her mother. The defendant himself also testified, on cross-examination, that "After the absolute deed was made there was a conversation with Ida in which she stated she hoped I would not be sorry for what I had done, and I said I would not because I knew my party and never took a gift back." He places the conversation, though, at a different time and occasion. It is very reasonable to conclude that in this statement he referred to the gift of this island property. As to the delivery of this "escrow" deed plaintiff testified: "It was a few days after or sometime after that, a short time, I was on my way upstairs one evening, and I was right about the middle of the stairway, and Mr. Gunther's room comes right out at the foot of the stairway. I was about the middle of the stairway and Mr. Gunther came out of his room and walked around the stairway, and he had a paper in his hand in an envelope, and he called to me and said, 'Here, Ida, to show that I really want you to have my property, here is a deed all in my own handwriting; now if anybody should say I was crazy when I gave you my property, that will show that a crazy man could never write a deed like this. It took me a whole week to write it. It will show everybody that I really want you to have my property,' and he said 'Have you got a good place to keep it?' I said: 'Yes, I had.' He said: 'Well, keep it so you can put your finger on it at any time,' and I took it upstairs with me. I had never seen that paper prior to the time he handed it to me there on the stairway. It was in his handwriting." Thereafter she kept the deed in her possession. Plaintiff's mother and father also testified substantially the same as to the occurrence, the mother adding that when she went upstairs Ida showed her the deed. Defendant also represented to others that Ida owned the island. He explains this transaction by stating that "Miss Bohn knew of the whole thing, that the whole thing was a sham in her favor to prevent my niece from bringing a contest. She knew she was not getting any

property by that transaction. I was carrying out this fraud to prevent my niece from contesting my will." But regardless of the question suggested by respondent, whether a court of equity should look with favor upon testimony coupled with the statement that the witness was simply carrying out a fraud, it is clear that the court and the jury had the legal right to believe the testimony of plaintiff and her witnesses, and that said finding in reference to this deed represents a rational inference from the showing made by respondent. Indeed, she might have relied upon the presumption arising from the possession of the deed, at least, until overcome by appellant's evidence (*Zihn v. Zihn*, 153 Cal. 407, [95 Pac. 868]), but the presumption was strongly fortified by the positive testimony of a number of witnesses.

Appellant complains also of that portion of the finding and judgment that accords to him the use and income of the property during his life. It is assailed as representing a timorous compromise, entirely unsustained by the evidence and clearly without the issues in the case. It is asserted that "At the end of the trial even the plaintiff as a human being must have recoiled from pursuing her efforts to utterly despoil the defendant and all save defendant must have been ready to compromise upon the theory of this finding." Manifestly, we are not in a position to verify this opinion of appellant, but from the fact that respondent has taken no appeal we may surmise that she is content with the result. In that, however, we see nothing to her discredit.

As to the evidence, there is much to show that, until an unfortunate misunderstanding arose between the parties growing out of attentions paid to respondent by a young man whom appellant seems to have disliked, it was the manifest purpose and understanding of all the parties concerned that appellant should enjoy the property while he lived and that then it should vest absolutely in respondent. From the correspondence hereinbefore referred to, it is clear that the Bohns came to California with the understanding that Ida was to have the property, but that appellant should not be deprived of its use or income while he lived. Evidence of this, also, is found in the execution of said escrow deed of August 19, 1901, and of the life estate deed of subsequent date giving him control

of the property while he lived. Indeed, the testimony of plaintiff alone is sufficient to support the conclusion that this was the understanding and intention of the parties.

It is true that this issue was not specifically raised by the pleadings. The title in fee, however, was directly in issue and this would include any less estate, and the court, under our practice, in an action to quiet title would certainly not be precluded from determining just what estate each party owns. The situation is similar to that involved in the Zihn case, *supra*, where there was a finding that "It was understood and agreed by and between the parties hereto that the plaintiff should have a life estate therein, and that said grantees should become the owners in fee thereof, subject to the plaintiff's life estate and right to use and occupy the same for his life." In discussing this, the supreme court, through Mr. Justice Angellotti, says: "This finding, which is upon a matter not specifically referred to in any of the pleadings, does not necessarily imply any lack of understanding upon the part of the donor as to the effect of the absolute deed of gift, or that the deed as delivered was not fully in accord with the desire and intention of the donor, but it is entirely consistent with the fact of a separate understanding and agreement then assented to by the grantees, relying on which plaintiff was willing to make and knowingly and voluntarily made delivery of the absolute deed of gift with the full understanding of its legal effect." The only question could be whether a parol agreement of like import could be enforced, but the power of a court of equity to accomplish this should hardly be open to controversy. The point, though, is not made by appellant. Besides, if such contention should be made and upheld, the result would be to leave the absolute title in respondent, and, under the circumstances, any court should hesitate to deprive appellant of the fruits of the judgment, although such disposition may be invited by him.

Appellant laments the inequality of the contest before the jury between the tears of an attractive young woman and the unalluring but ingenuous story of an old man. The tears, however, are not preserved in the record. If they were, we do not know how much they might affect the judgment of this court. It is sufficient to say, though, that, accepting the

facts as we must, the judgment of the lower court is not only amply sustained but that it is eminently just and equitable.

The judgment is affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 8, 1912, and the following opinion then rendered thereon:

BURNETT, J.—The petition for rehearing is addressed to the proposition that the finding of the lower court to the effect that plaintiff is entitled to the fee, subject to the right of defendant to the possession and use of the property during his life, is not within the pleadings and is unsupported by the evidence.

It is, no doubt, true, as claimed by appellant, that "the plaintiff's case cannot be better as proved than it is as stated. A party cannot travel out of the matter alleged in his pleading to make a ground of relief. A finding is useless and idle unless the facts found are within the issues and a judgment based upon such facts cannot be sustained." And we have no fault to find with the cases cited in support of the doctrine, but they involve a different situation from what we have here. It seems plain on principle that, in legal procedure as well as in physics, the whole includes a part, and that it cannot be said that this finding is entirely without the matter alleged in the pleadings.

In the *Zihn* case, 153 Cal. 405, [95 Pac. 868], the principle is recognized, where the supreme court approved a finding of the lower court awarding the plaintiff therein a life estate under a deed absolute in form, notwithstanding that there was no specific averment in any of the pleadings as to such life estate.

In *Pennie v. Hildreth*, 81 Cal. 133, [22 Pac. 400], which was an action to quiet title, the supreme court said: "If the plaintiff claims a fee simple, he may show that he has nothing more than a lien or any interest less than he claims, and that he, the defendant, has an interest also, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accord-

ingly. If the defendant had an equitable title to one-half of the property in controversy, whether that interest was subject to the mortgage of the plaintiff or paramount to it, he had a right to have it so decreed and the interest of the plaintiff declared."

As to the evidence to support the finding, we think there can be no kind of doubt. Much of it we deemed unnecessary to set out in the former opinion, but we called attention to certain facts and circumstances which appeared to us sufficient rationally to justify the court's conclusion. In her answer to appellant's petition for rehearing, respondent points out in the transcript unequivocal testimony to the effect that it was the purpose and understanding of appellant that he should retain the life interest in the property. We quote simply from one of the witnesses as to a conversation with Mr. Gunther: "I said, I see you have deeded your island away. He said, yes, and in a moment he said he wanted his property to go where he wanted it to go while he was alive. He said in that conversation that he had a life lease in the property. . . . He simply said he had reserved a life estate, a life lease."

Some asserted circumstances are mentioned by appellant concerning which the record is entirely silent. We need not, of course, remind the able counsel for petitioner that we are controlled by the record as we find it.

Appellant seems to misconstrue the spirit of an expression found in the concluding paragraph of the former opinion and, as it is unnecessary to the decision, the said paragraph is stricken out and there is substituted therefor the following: "It is sufficient to say in conclusion that, accepting the facts as we must under the well-established rule applicable to appellate tribunals, the judgment of the lower court is not only amply sustained but is eminently just and equitable."

The petition for rehearing is denied.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 8, 1912.

[Civ. No. 898. First Appellate District.—February 9, 1912.]

D. J. BRODERICK, Appellant, v. ROBERT COCHRAN and CHARLES BRADY, Copartners Doing Business Under the Firm Name of COCHRAN & BRADY, Respondents.

ORDER VACATING JUDGMENT BY DEFAULT—DEMURRER UNDER ORDER EXTENDING TIME TO ANSWER—GOOD FAITH—JUDGMENT WITHOUT NOTICE—PROPER DISCRETION.—Where, under an order extending time to answer, the attorney for the defendants filed a demurrer, and it is not disputed that he believed he had a right to file the same, and no objection was made by plaintiff when the demurrer was filed, but plaintiff's attorney without notice procured an order striking out the demurrer and a judgment by default, and the motion to vacate the judgment by default was promptly made, and it was manifest that the plaintiff had suffered no injury, it is held the court by its order vacating the judgment by default, and permitting the defendants to answer, exercised its discretion in accordance with the soundest principles of justice.

ID.—MISAPPREHENSION OF LAW—POWER OF COURT TO RELIEVE PARTIES FOR MISTAKES OF ATTORNEYS.—In believing that the attorney for the defendant might demur after having taken time by order of the court to answer only, it is conceded that he was acting under a misapprehension of law. But courts have power under the provisions of section 473 of the Code of Civil Procedure to relieve parties from mistakes as to the legal effect of acts of their attorneys.

ID.—AFFIDAVIT OF DEFENDANT SERVED WITH NOTICE OF MOTION.—An affidavit of one of the defendants served with the notice of the motion, though not embodied in the notice, sufficiently apprised the attorney for the plaintiff that such affidavit would be relied upon at the hearing of the proceeding, and it is held that this amounted to a substantial compliance with the provisions of section 1010 of the Code of Civil Procedure.

ID.—AFFIDAVIT OF ATTORNEY FOR DEFENDANTS—SUPPORT OF ORDER.—It is held that the affidavit of the attorney for defendants alone contains all essential facts necessary to sustain the order vacating the judgment by default.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a judgment by default. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Edward J. Lynch, for Appellant.

C. D. Dorn, and Lewis F. Byington, for Respondent.

KERRIGAN, J.—This is an appeal by plaintiff from an order vacating a judgment taken by default.

The complaint in the case was filed February 28, 1910. March 1st following, the summons was served in the city and county of San Francisco, where the action was commenced. Thereafter the defendants were granted by the court up to and including the 21st of March within which to answer. On this date the defendants served and filed a demurrer to the complaint, and the same was placed on the law and motion calendar for hearing on March 25th, as required by the rules of court. This calendar was then continued by the court to April 1st. While the demurrer was on the court calendar on this date it was not on the official printed calendar; and the attorney for defendants, supposing therefore—so he alleges in an affidavit filed by him—that the demurrer would not be heard, failed to appear in court. Thereupon the attorney for the plaintiff moved the court to strike from the files the demurrer of the defendants, and to enter judgment against them by default, on the ground that the defendants' time to answer had expired without an answer having been filed by either of them, and that the demurrer had been filed after the time allowed by law therefor. This motion was granted. No notice of the motion was given, and the defendants knew nothing about the judgment of default against them until April 6th, on which day their counsel prepared, served and filed all the papers necessary to support a motion to vacate the judgment so entered, and noticed the same for hearing on the eighth day of April. The affidavit of counsel for defendants shows that he supposed the filing of the demurrer "to be a legal and proper answer to the said complaint"; that he "interpreted and understood the said order of the court to give the defendants ten days to plead after the tenth day of March, 1910, and he is now surprised to find the same interpreted to mean that he could only answer and could not demur to the complaint."

Upon the showing made the court ordered the judgment set aside upon the payment of costs.

In believing that he might demur after having taken time by order of the court to answer only, counsel for defendants, it is conceded by both sides, was acting under a misapprehension as to a proposition of law. Courts, however, under the provisions of section 473, Code of Civil Procedure, may relieve parties from mistakes as to the legal effect of acts of their attorneys. (*Douglass v. Todd*, 96 Cal. 655, [31 Am. St. Rep. 247, 31 Pac. 623]; *Ward v. Clay*, 82 Cal. 502, [23 Pac. 50, 227]; *Langford v. Langford*, 136 Cal. 507, [69 Pac. 235]; *Gould v. Stafford*, 101 Cal. 32, [35 Pac. 429].) Here it is not disputed that defendants' attorney believed he had a right to interpose a demurrer to the complaint; no objection appears to have been made by the attorney for the plaintiff when a copy of the demurrer was served upon him, he gave the defendants no notice of a motion to strike the demurrer from the files, the motion to vacate the default was promptly made, and as it is manifest that the plaintiff suffered no injury in the premises it would seem that the court, in setting aside the judgment and permitting the defendants to answer, exercised its discretion in accordance with the soundest principles of justice. (*O'Brien v. Leach*, 139 Cal. 220, [96 Am. St. Rep. 105, 72 Pac. 1004]; *Melde v. Reynolds*, 129 Cal. 308, [61 Pac. 932].)

The notice of motion to set aside the default does not state that the affidavit of Robert Cochran, one of the defendants, would be used on the hearing. It appears, however, that a copy of that affidavit was served on the attorney for the plaintiff along with the notice of motion. He was therefore apprised that this affidavit would be relied upon at the hearing of the proceeding, and we have no doubt that this amounted to a substantial compliance with the provisions of section 1010, Code of Civil Procedure. The affidavit of the attorney for the defendants alone contains all essential facts necessary to sustain the order of the court here questioned.

The order appealed from is affirmed.

Hall, J., and Lennon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 9, 1912.

[Civ. No. 920. First Appellate District.—February 10, 1912.]

UNION COLLECTION COMPANY, a Corporation, Plaintiff, Respondent, v. E. B. ROGERS, Defendant, Appellant, and ROGERS ENGINEERING COMPANY, a Corporation, Defendant.

ACTION UPON GUARANTY OF INDEBTEDNESS—TERMS OF PAYMENT—PLEADING—PROOF—IMMATERIAL VARIANCE—GUARANTOR NOT MISLED.—Where the complaint, in an action against the individual defendant upon his contract of guaranty of the indebtedness of the corporation defendant to plaintiff's assignor, alleges that by the terms of the written guaranty it was agreed to pay the indebtedness with interest in installments at the rate of \$75 per month, but the proof was that the writing merely guaranteed the principal sum with interest, and shows a variance as to the installments, it is held that where such variance could not have misled the guarantor to his prejudice in maintaining his defense that he had signed no guaranty at all of the debt in question, the variance was immaterial.

ID.—TERMS OF PAYMENT IMMATERIAL—LAPSE OF INSTALLMENTS BEFORE SUIT—ABSENCE OF OBJECTION TO EVIDENCE—AVOIDANCE OF OBJECTION.—Whether or not the balance of the indebtedness was payable at once or in installments is of little or no importance, since in either case the whole of the indebtedness was long overdue before the action was commenced, and there was no objection to the evidence or motion for nonsuit on the ground of variance or any ground; and if such objection had been made, it might have been obviated by an amendment to conform the pleading to the proof.

ID.—ALLEGATION AND FINDING AS TO INSTALLMENTS DISREGARDED.—In view of the time of the commencement of the action, the allegation and finding to the effect that the balance of the indebtedness was to be paid at the rate of \$75 per month may be disregarded, where there is left the allegation and finding that the principal obligor in writing promised to pay the balance of the indebtedness with the specified interest, and that the appellant in writing guaranteed the payment of the same, the whole balance being due and unpaid when the action was brought.

ID.—NEW TRIAL NOT GRANTABLE FOR VARIANCE NOT OBJECTED TO.—It is held that a new trial should not be ordered on the ground of the variance complained of, especially as the point was not raised in the court below either upon objection to evidence or upon motion for a nonsuit.

ID.—SUPPORT OF FINDING AS TO WRITTEN GUARANTY OF DEBT—CONFLICTING EVIDENCE—PREPONDERANCE.—Where there is a substantial con-

flict in the evidences as to whether the appellant guaranteed in writing the payment of the principal debt, the appellate court cannot disturb the finding of the trial court on the ground that the trial court has not decided in accordance with preponderance of the evidence.

ID.—CROSS-EXAMINATION AS TO EXECUTION OF GUARANTY—STRIKING OUT ANSWER NOT PREJUDICIAL.—It is held that the court did not err to the prejudice of the appellant in striking out his answer on cross-examination denying the execution of the contract of guaranty, where in other answers to other questions the appellant had fully and clearly covered the same matter.

ID.—APPEAL FROM ORDER DENYING A NEW TRIAL—SUPPORT OF JUDGMENT BY FINDINGS NOT REVIEWABLE.—The objection that the judgment is not supported by the findings cannot be raised upon appeal from an order denying a new trial.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Percy L. Shuman, and Charles Baer, for Appellant.

J. S. Reid, for Respondent.

HALL, J.—This action was brought against Rogers Engineering Company, as principal obligor, and E. B. Rogers, as guarantor, to recover the sum of \$575.69 and interest.

The defendant corporation was never served with summons and the action was dismissed as to it.

Judgment was recovered against defendant E. B. Rogers as prayed for.

This is an appeal by him from the order denying his motion for a new trial. He also took an appeal from the judgment, but such appeal has been heretofore dismissed because not taken within the time allowed therefor by the statute.

Plaintiff sued as assignee of the Buffalo Gasoline Motor Company, a corporation.

It is in substance alleged in the complaint, among other things essential to a cause of action, that the defendant Rogers Engineering Company, on the twenty-third day of March, 1906, was indebted to the Buffalo Gasoline Motor Company

in the sum of \$865.69, and on said day promised in writing to pay said Buffalo Gasoline Motor Company said sum of \$865.69, and thereupon did pay thereon the sum of \$290, and by said writing further promised to pay the balance of said indebtedness, to wit, \$575.69, with interest thereon at the rate of six per cent per annum until paid, at the rate of \$75 per month commencing with the fifteenth day of April, 1906. This is followed by an allegation that appellant at the same time and place in writing guaranteed the payment of the said indebtedness and interest, for a valuable consideration. (The writings sued on were destroyed in the great conflagration of 1906.)

The court found the above allegations to be true; and the principal contention of appellant on this appeal is that such findings are not supported by the evidence.

And this contention is predicated upon the fact that the evidence shows that, by the terms of the writing, the principal obligor promised to pay the indebtedness and interest at six per cent, without any specification as to when such payment should be made, and the provision that the balance of \$575.69 should be paid at the rate of \$75 per month was by a parol agreement only.

In other words, the evidence given supports the allegations as made in the complaint as to the promise in writing to pay the balance of the indebtedness of \$575.69 with interest at six per cent per annum, but does not support the allegation that such payment was to be made at the rate of \$75 per month.

This presents a case of variance between the allegations of the complaint and the proof, which could have worked no injury to defendant, and could not have misled him in maintaining his defense, which was that he had not signed or executed any guaranty at all of the debt in question.

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party had been so misled, the court may order the pleading to be amended upon such terms as may be just." (Code Civ. Proc., sec. 469.)

In the case at bar the evidence given upon behalf of plaintiff shows that the defendant corporation was indebted in the amount alleged, and in writing agreed and promised to pay the same with interest as alleged, and that appellant, who was the president of the principal obligor, in writing guaranteed such payment. Whether or not the balance of the indebtedness was payable at once, or was payable only in installments of \$75 per month is of little or no importance, for in either case the whole of such indebtedness was long overdue before the action was commenced. No objection was made to the introduction of the evidence, either upon the ground of variance or any other. If such objection had been made, doubtless the court would have permitted an amendment so that the allegations and proof might correspond. The allegation and finding to the effect that the balance of the indebtedness was to be paid at the rate of \$75 per month may be disregarded, and we still have an allegation and finding that the principal obligor in writing promised to pay the balance of the indebtedness, to wit, the sum of \$575.69, with interest at six per cent per annum, and that appellant in writing guaranteed the payment of the same. In either aspect of the case the evidence and other findings show that the whole of such balance was long overdue and unpaid when the action was brought. We do not think a new trial should be ordered for the variance complained of, especially as the point was not raised in the court below either upon objection to evidence or upon a motion for a nonsuit. (*Eversdon v. Mayhew*, 85 Cal. 1, [21 Pac. 431, 24 Pac. 382].)

Appellant also urges that the finding that appellant guaranteed in writing the payment of the debt is not supported by the evidence.

He concedes that there is a conflict in the evidence upon this point, but urges that the finding in question is not supported by a preponderance of evidence. If there is a substantial conflict in the evidence upon an issue of fact, this court will not disturb the finding of the trial court because it may think that the trial court has not decided in accordance with the preponderance of evidence. The finding in question is supported by the positive testimony given by the witness Reid, and although such testimony was disputed by

appellant, the contention of appellant that the finding in question was not supported by the evidence cannot be sustained.

The court did not err to the prejudice of appellant in striking out an answer that he gave on cross-examination as follows: "I am positive that I signed no paper guaranteeing any claim of any kind on that date," for in other answers that appellant made to other questions he fully and clearly covered the same matter.

The only other point raised by appellant, to wit, that the judgment is not supported by the findings, cannot be raised upon this appeal, being, as it is, an appeal from an order denying a motion for a new trial. (*Hunter v. Milam*, 133 Cal. 601, [65 Pac. 1079].)

The order is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 365. First Appellate District.—February 13, 1912.]

THE PEOPLE, Respondent, v. ANDREW MORAN,
Appellant.

CRIMINAL LAW—ATTEMPT TO COMMIT ROBBERY—SUFFICIENT OVERT ACT.

It is held that the evidence in the record is sufficient to sustain a conviction for an attempt to commit robbery, since it shows more than mere acts of preparation, and shows a sufficient overt act to constitute the crime charged.

ID.—CONFEDERATES IN CRIME—COMMITTER OF OVERT ACT NOT MATERIAL.

Where the whole case shows that defendants, jointly indicted for the same offense of attempting to commit robbery, were each responsible for the criminal acts of the other committed in furtherance of their joint enterprise, it is unimportant that the evidence in the record upon appeal in this case does not show which of the defendants committed the overt act.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Joseph A. Brown, for Appellant.

U. S. Webb, Attorney General, and J. H. Riordan, Deputy Attorney General, for Respondent.

HALL, J.—Appellant was jointly charged with one Harold Jones with the crime of attempt to commit robbery, and was upon his trial found guilty as charged, and upon judgment being pronounced took an appeal from such judgment to this court.

The only point urged in the brief for a reversal is that the evidence does not show any overt act or attempt upon the part of appellant, but only acts of preparation. We think, however, that the evidence in the record does show something more than mere acts of preparation, and does show a sufficient overt act to constitute an attempt to commit robbery, within the rule as to attempts to commit crimes as laid down in *People v. Stites*, 75 Cal. 570, [17 Pac. 693].

The evidence tends to show that either appellant or his co-defendant, at between 1 and 2 o'clock in the morning, pushed open the swinging doors of a saloon situate on Kentucky street, thrust his head within, and seeing that there were about twelve men in the saloon, withdrew and crossed the street and joined his codefendant. The two men walked away, but were immediately followed by an officer to whom they had been pointed out. The defendants were followed by the officer for about two blocks, when they took refuge in a lumber yard, where, after a search of five or six minutes, they were found by the officer hiding behind a pile of lumber. Each defendant wore around his neck a handkerchief, with holes so fashioned that it might serve as a mask to conceal the features. Appellant had upon his person a loaded pistol. His companion had upon his person cartridges, and a pistol was shortly afterward found, by a second officer, concealed where defendants were apprehended. They were immediately taken back to the saloon. The next day appellant admitted to an officer that he "was out to do a job, but not to do that saloon."

It is quite immaterial whether it was appellant or his co-defendant that thrust open the door of the saloon and started to enter therein, for there can be little doubt but that they were acting in concert in whatever they were engaged upon the night in question.

The facts in evidence were ample to justify the conclusion that the person who pushed open the saloon door did so for the purpose and with the intent to enter the saloon, and with force and violence feloniously take from the possession of the inmates such money as they might have upon them. The pushing open the door and the partial entry through the same were overt acts that went beyond mere acts of preparation. They were such overt acts as amounted to an attempt to commit the intended crime within the doctrine laid down in *People v. Stites*, 75 Cal. 570, [17 Pac. 693]. The large number of persons in the saloon prevented the consummation of the robbery. In the *Stites* case the defendant and a confederate had arranged to place an explosive or bomb upon the track of the Sutter street railroad. The bomb having been previously prepared *Stites* took it and left his house and went to meet his confederate. Having met him they proceeded on their way toward their objective point, where they intended to place the bomb on the track, but before reaching the point discovered that they were being watched by some police officers, when they abandoned their purpose. It was held that the evidence supported the verdict of guilty. The court held that the construction of the bomb was an act of preparation only. The court however said: "But when the prisoner left his house on the morning of the 16th of February and went to Turk street pursuant to the antecedent arrangement between his confederate and himself, it amounted to an overt act done by him for the purpose of effecting the crime intended, and was in law and fact a criminal attempt."

So, in the case at bar, when one of the defendants pushed open the saloon door with intent to enter and rob the inmates, he was guilty of an overt act that amounted in fact and in law to an attempt to commit the crime of robbery. This case cannot be distinguished in principle from *People v. Stites*, 75 Cal. 570, [17 Pac. 693]. It is unimportant that the evidence in the record before us does not show which of the defendants committed the overt act. The whole case shows that they were acting in concert and as confederates, and each was responsible for the criminal acts of the other committed in furtherance of their joint enterprise.

The judgment is affirmed.

LENLON, P. J., and Kerrigan, J., concurred.

[Civ. No. 899. First Appellate District.—February 13, 1912.]

SAN FRANCISCO CREDIT CLEARING-HOUSE, a Corporation, Respondent, *v.* L. D. MACDONALD, Appellant.

ACTION ON NOTE BY ASSIGNEE—COMPETENCY OF ASSIGNOR—COMPROMISE OF INDEBTEDNESS—UNTENABLE DEFENSE OF PAYEE'S INSANITY.—
In an action on a note assigned by the payee to the plaintiff after being adjudged mentally competent, a defense that when the note was given by a competent maker, in compromise of his indebtedness to the payee, who had not then been adjudged incompetent, that the payee was so far mentally deranged prior to and at the time of the compromise as to be incapable of entering into a contract of any kind, cannot be sustained nor properly pleaded and proven as a legal defense to the note.

ID.—CONSTRUCTION OF CODE—BENEFIT OF "PERSON WITHOUT UNDERSTANDING"—PROVISION NOT AVAILABLE BY PERSON OF SOUND MIND.
The provision in section 38 of the Civil Code that "A person entirely without understanding has no power to make a contract of any kind," was enacted for the benefit and protection of persons who are entirely devoid of capacity to comprehend the nature and subject of a contract, and it cannot be invoked by a person of sound mind in an attempted avoidance of a contract which he may have made with a person subsequently ascertained to be of unsound mind.

ID.—POWER OF RESCISSION UNDER CODE LIMITED TO RESCINDING PARTY.
The provision in section 39 of the Civil Code, that "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission," was also enacted for the benefit and protection of incompetent persons, and until that right is exercised, the contract is binding upon the party of sound mind.

ID.—BENEFICIAL CONTRACT IN FAVOR OF PERSON OF UNSOUND MIND—LEGAL PRESUMPTION.—ESTOPPEL.—Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes in his favor the existence of the requisite capacity, or for his protection estops the other party to set up and sustain the objection as against the legal representative of the payee, that the payee was *non compos mentis* when the contract was made.

ID.—COMPROMISE WITH ATTORNEY IN FACT OF PAYEE—REVOCATION UPON INSANITY—QUALIFICATION OF RULE—RATIFICATION UPON RESTORATION.—Though it may be conceded that if the compromise of the indebtedness which resulted in the note was made with the payee's attorney in fact under a general power of attorney while the payee was entirely without understanding, the powers of the attorney in fact were terminated by operation of law as to persons having notice of the principal's disability, yet this general rule

of law is subject to the qualification that if, upon his restoration to reason, the principal ratifies, or fails after knowledge to repudiate, the acts of his agent, the powers previously granted will be considered merely as suspended, and the acts done by the agent will be deemed assented to by the principal.

ID.—RATIFICATION OF COMPROMISE—ASSIGNMENT OF NOTE FOR COLLECTION—ESTOPPEL AS TO INDEBTEDNESS.—Where the payee alleged to be insane, upon being restored to reason, assigned the note to the plaintiff for collection, this was an acceptance of the note and a ratification of the compromise from which the note emanates; and upon the principle that "He who can and does not forbid an act which is done in his behalf is deemed to have bidden it," the payee would by the judgment in the action be forever estopped from claiming or suing upon the original indebtedness.

ID.—MENTAL CONDITION OF PAYEE AT TIME OF EXECUTING NOTE—SUPPORT OF FINDING.—It is held that the evidence upon the whole case sufficiently supports the finding of the court that at the time of the execution of said promissory note, the payee had sufficient mental capacity to understand the nature and purpose of said transaction; that a person, though insane in a general sense, may not be deprived of the power of knowing and understanding the nature of ordinary business transactions, and in such case the form of mental unsoundness will not render a person legally incapable of entering into a valid contract.

ID.—TESTIMONY OF PHYSICIAN IN CHARGE OF PAYEE AS INSANE.—The testimony of the physician who had charge of the payee as an insane person was properly admitted in his behalf, and in behalf of his assignee for collection, as his agent, that he was not, while in his care, so far mentally deranged as to be entirely incapable of knowing the nature and purpose of the transaction in question; and that he was discharged as completely cured mentally, after having been in his care about one year and a half.

ID.—CONSTRUCTION OF CODE AS TO DISQUALIFICATION OF PHYSICIAN—BENEFIT OF PATIENT—WAIVER.—The general rule of law found in subdivision 4 of section 1881 of the Code of Civil Procedure, which in effect declares that a physician may not give in evidence any information concerning the ailment of his patient which was acquired in the performance of his professional duties, was created for the protection of the patient, and operates upon the physician alone, and confers a personal privilege on the patient, which may be expressly or impliedly waived by him in person, or by an agent or attorney acting on his behalf.

ID.—ALLOWANCE OF INTEREST UPON NOTE—AMBIGUOUS PROVISION.—Where the note sued upon is ambiguous as to the mode in which interest should be allowed thereon, the trial court properly adopted that construction which was favorable to the party in whose favor the note was made.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

James H. Boyer, for Appellant.

R. H. Cross, for Respondent.

LENNON, P. J.—This is an action upon a promissory note wherein the plaintiff, as the assignee of the payee for the purpose of collection only, recovered a judgment against the defendant in the sum of \$1,546, from which an appeal has been taken upon the judgment-roll and a bill of exceptions.

Plaintiff's case rested upon proof of the execution of the note, the amount due and unpaid thereon, and its assignment to plaintiff for the purpose of collection.

A reversal of the judgment is asked for because of an alleged error in the admission of evidence, and on the ground that the findings of the trial court are not supported by the evidence, and that the findings in turn do not support the judgment.

In substance the undisputed facts of the case, as shown by the evidence and findings, are these: W. S. Gage, W. L. B. Mills and L. D. MacDonald, the defendant in this action, at one time were copartners in the lumber business in the city of San Francisco, under the firm name of Gage, Mills & Company. The copartnership was dissolved by mutual consent on November 20, 1904. At and prior to its dissolution the firm of Gage, Mills & Co. was indebted to W. S. Gage personally in the sum of \$19,000, and some two years later Mills, as the attorney in fact for Gage, under a power of attorney executed sixteen years before, effected a compromise of defendant MacDonald's share of the indebtedness due the firm of Gage, Mills & Co. by accepting his promissory note to Gage dated and made April 10, 1906, for the sum of \$4,000. Upon the making and delivery of this note by MacDonald to Mills, the latter, as the attorney in fact for Gage, made and delivered to MacDonald Gage's receipt in full of all demands. On March 15, 1906, Gage became, and for more than one year

thereafter remained, an inmate of a private sanatorium conducted by Dr. A. M. Gardner at Belmont, California.

The existence of a prior indebtedness and the execution of the note in settlement thereof were not denied by the defendant; but he pleaded as a defense to the note that the payee was so far mentally deranged prior to and at the time the compromise was made and the note executed, as to be absolutely incompetent and incapable of entering into a contract of any kind. It was the contention of the defendant in the lower court, and it is his contention here, that when one of two parties to a contract is insane at the time of its execution there cannot be a concurrence of minds capable of contracting, and that therefore such a contract is void in law and not enforceable against either party.

This contention cannot be sustained. Section 38 of the Civil Code, which declares that "A person entirely without understanding has no power to make a contract of any kind," was enacted for the benefit and protection of persons who are entirely devoid of capacity to comprehend the nature and subject of a contract, and it cannot be invoked by a person of sound mind in an attempted avoidance of a contract which he may have made with a person subsequently ascertained to be of unsound mind. Assuming, as the defendant claims, that the evidence conclusively and without conflict shows that the payee of the note in the case at bar was wholly insane at the time the compromise was effected and the note executed, that fact alone could not be properly pleaded and proven as a legal defense to the note. (*Caldwell v. Ruddy*, 2 Idaho, 1, [1 Pac. 339]; *Allen v. Berryhill*, 27 Iowa, 534, [1 Am. Rep. 309]; *Atwell v. Jenkins*, 163 Mass. 362, [47 Am. St. Rep. 463, 28 L. R. A. 694, 40 N. E. 178]; *Warmesley v. Darragh*, 12 Misc. Rep. 199, [33 N. Y. Supp. 274].)

The case of *Allen v. Berryhill*, 27 Iowa, 534, [1 Am. Rep. 309], was also an action upon a promissory note. In its essential features that case was very similar to the case at bar. There, as here, the defense was that the payee was totally insane when the note was made and wholly incapacitated to enter into a contract. In deciding that such a defense was not available to a person of sound mind, the court said: "Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence

of the requisite capacity, or for his protection estops the other party to set up and sustain this objection. . . . It is the opinion of the court that justice and sound policy concur in requiring it to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the sane party merely to show that the other party was *non compos mentis* at the time that the contract was made."

It was further pleaded, and it is now urged upon behalf of the defendant, that the insanity of the payee of the note at the time of its execution by operation of law terminated the powers of his attorney in fact, and thereby rendered nugatory the compromise and the note given in consideration thereof. It may be conceded that if the payee at the time of the compromise was a person entirely without understanding within the meaning of section 38 of the Civil Code, the powers of his attorney in fact under the general power of attorney previously executed were terminated by operation of law as between the principal and agent and as to every other person having notice of the principal's disability. (Civ. Code, sec. 2356.) The general rule of law, however, which terminates the agent's authority during the period of the principal's total insanity is subject to the qualification that if, upon his restoration to reason, the principal ratifies or fails, after knowledge, to repudiate the acts of his agent, the powers previously granted will be considered merely as suspended, and the acts done by the agent will be deemed assented to by the principal. (*Davis v. Lane*, 10 N. H. 156; 1 Clark & Sayles on Agency, sec. 19, p. 44; sec. 187, pp. 442, 443.)

In the case at bar, Gage, the alleged insane person and payee of the note in controversy, upon being restored to reason indorsed and assigned the note to the plaintiff for the purpose of collection. This was undoubtedly an acceptance of the note and a ratification of the compromise from which the note emanated, and upon the principle that "He who can and does not forbid that which is done in his behalf is deemed to have bidden it" (Civ. Code, sec. 3519), Gage would by the judgment here be forever estopped from claiming or suing upon the original pre-existing indebtedness.

However that may be, we are not now confronted with the case of a person known or judicially declared to be a person afflicted with a complete and permanent form of insanity.

The evidence upon the whole case by no means supports the defendant's assertion that the payee here was at the date of the note or at any other time wholly without understanding. The trial court found as a fact "That at the time said W. S. Gage entered said sanatorium his mental capacity had become greatly impaired and that he was afflicted with a mental disease known as and called melancholia; that he was then a person of unsound mind but was not entirely without understanding, nor had his capacity been judicially determined; that at the time of the execution of said promissory note he had sufficient mental capacity to understand the nature and purpose of said transaction; that on or about the seventeenth day of September, 1907, and for a long time prior thereto, said W. S. Gage was of sound mind, and was so at the time he left said sanatorium, and ever since has been and now is of sound mind."

In substance it was further found as a fact that before the commencement of this action, and in the year 1908, said W. S. Gage personally indorsed and assigned said promissory note to plaintiff as trustee for the purpose of collection. No claim is made that the latter finding is contrary to the evidence; and in our judgment the evidence upon the issue of the defendant's insanity is without conflict, and fully supports the findings of the trial court upon that phase of the case. True, all of the witnesses were agreed that Gage was insane from the time he entered the sanatorium until he was discharged as cured in September, 1907. No witness, however, either fact or expert, testified that Gage was so insane during this time as to be wholly without understanding in the sense required by section 38 of the Civil Code. On the other hand, the uncontradicted testimony of Dr. A. M. Gardner, called as a witness for the plaintiff, was to the effect that while under his care and observation Gage was undoubtedly insane, but that at no time was he so far mentally deranged as to be entirely incapable of knowing the nature and the purpose of the transaction in question; and that when discharged in September, 1907, Gage was completely cured and fully restored to the possession of his mental faculties. Obviously section 39 of the

Civil Code cannot be invoked in aid of the defense pleaded here. That section provides that "A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in the chapter on rescission . . ."; and, like section 38 of the same code, was enacted for the benefit and protection of incompetent persons. Manifestly the right to rescind a contract entered into with a person of sound mind is, by the provisions of section 39, conferred solely upon the incompetent or his representatives, and until that right is exercised the contract is binding upon the party of sound mind.

A person of unsound mind whose incapacity has been judicially determined cannot make a contract nor delegate any power until his restoration to capacity (Civ. Code, sec. 40); but the contract of a person of unsound mind, although not entirely deprived of understanding nor judicially determined to be insane, is not void but merely voidable. (*More v. Calkins*, 85 Cal. 177, [24 Pac. 729]; *Castro v. Giel*, 110 Cal. 292, [52 Am. St. Rep. 84, 42 Pac. 804]; *Ripperdan v. Weldy*, 149 Cal. 667, [87 Pac. 276].)

It would seem, therefore, that a person may be insane in the general acceptation of the term, and yet his insanity may be of such a character as not to deprive him entirely of the power of knowing and understanding the nature of ordinary business transactions, and that such form of insanity, or rather unsoundness of mind, will not render a person legally incapable of entering into a valid contract. (*Motley v. Head*, 43 Vt. 631; *Dennett v. Dennett*, 44 N. H. 531, [84 Am. Dec. 97].)

It follows that if Gage was not, as the trial court found, so far insane at the time of the compromise as to be considered a person entirely without understanding, he in person would have been legally capable of conducting and completing negotiations for the settlement of his claim against the defendant, and, as a matter of course, that which Gage could do in person might also be done by his agent and attorney in fact.

The defendant objected to the testimony of Dr. Gardner upon the ground that the knowledge of the witness was acquired in the capacity of a physician in attendance upon a patient; and it is now insisted that the trial court's action in

overruling the objection was error. The ruling, under the facts and circumstances of this case, was free from error.

The general rule of law, found in subdivision 4 of section 1881 of the Code of Civil Procedure, which in effect declares that a physician may not give in evidence any information concerning the ailment of his patient which was acquired in the course of his employment and necessary to the performance of his professional duties, was created for the protection of the patient. It operates upon the physician alone, and confers a personal privilege on the patient, which may be expressly or impliedly waived by him in person or by an attorney or agent acting on his behalf. (*Lissak v. Crocker*, 119 Cal. 442, [51 Pac. 688]; *Alberti v. New York etc. Ry. Co.*, 118 N. Y. 77, [6 L. R. A. 765, 23 N. E. 35].) If Gage in person had sued upon the note in controversy, he would undoubtedly have waived the privilege which the law gives him of sealing the mouth of his physician by calling the latter to testify. The assignment of the note to plaintiff for the purposes of collection certainly made the plaintiff the agent of Gage, and carried with it the implied consent to use such means and introduce such evidence upon the trial of the case as might be necessary to a recovery on the note, and therefore, the act of plaintiff in calling and examining Dr. Gardner as a witness must be held to be Gage's act and Gage's waiver of the confidence reposed by him in his physician.

The note in controversy was in the form of a one-day note, and provided for interest upon the full amount thereof at the rate of one per cent per annum until paid, but the concluding clause of the note provided that it was "payable at the rate of \$50 per month." The parties to the action proceeded to trial upon the theory that the note was payable in the installments specified, and the trial court accordingly rendered judgment for the principal sum of \$1,200, which was the amount found to be due and unpaid at the commencement of the action, and in addition awarded interest thereon in the sum of \$146.

The defendant now makes the point that the concluding clause of the note controlled the entire instrument, and must be construed to mean that the interest was not payable immediately, and that therefore the trial court could render judg-

ment only for the balance due on the note to the date of the action.

The note in the particulars stated is ambiguous and susceptible of two different constructions, either of which would be proper, and the trial court rightfully adopted that which was most favorable to the party in whose favor the note was made. (Code Civ. Proc., sec. 1864; *Balfour v. Fresno*, 109 Cal. 221, [41 Pac. 876].)

The judgment appealed from is affirmed.

Hall, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 14, 1912.

[Civ. No. 912. First Appellate District.—February 13, 1912.]

JOHN S. KNOX, Appellant, v. HENRY SCHRAG et al.,
Respondents.

APPEAL FROM ORDER CHANGING PLACE OF TRIAL—RECORD IMPROPERLY AUTHENTICATED—CERTIFICATE OF CLERK.—Where, upon appeal from an order changing the place of trial of an action, the transcript upon appeal is entitled a "Bill of Exceptions," including affidavits, notice of motion for change of venue, demand for such change, amended complaint, demurrer thereto, order of court granting the motion and notice of appeal, which was not settled by the judge as required by rule XXIX, and no attempt was made to follow the new method of procedure, but the only authentication of the record is that of the clerk presented in the transcript, a record so authenticated is held wholly insufficient as a basis for this court to review the order appealed from.

Id.—PROPER PROCEDURE FOR INSUFFICIENT RECORD—AFFIRMANCE.—It is held that the proper procedure, in such case, is not to dismiss the appeal, but to affirm the order appealed from.

APPEAL from an order of the Superior Court of Alameda County granting a motion to change the place of trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Langan & Mendenhall, for Appellant.

Lloyd S. Ackerman, for Respondents Henry Schrag and John Casey.

HALL, J.—This is an appeal from an order granting the motion of defendants for a change of the place of trial from Alameda county to Calaveras county.

Respondents object to the hearing of the appeal upon its merits, and ask this court to dismiss the appeal because, as it is claimed, no properly authenticated record has been filed in this court.

The transcript filed in this court is entitled "Bill of Exceptions," and consists of various documents, including, among others, various affidavits, notice of motion for change of venue, demand for such change, amended complaint, demurrer to amended complaint, order of court granting motion, and notice of appeal. No bill of exceptions was ever settled by the judge as required by rule XXIX, [144 Cal. lii, 119 Pac. xiv], and no attempt was made to follow the procedure authorized by sections 953a, 953b and 953c, Code of Civil Procedure.

The only authentication of the record is that contained in a certificate of the clerk printed in the transcript, to the effect that the transcript "contains full and true copies of the bill of exceptions and notice of appeal from order, and all papers used in motion for change of venue, now on file in said court and cause."

A record so authenticated is wholly insufficient as a basis for this court to review the order appealed from. (*Harrison v. Cousins*, 16 Cal. App. 515, [117 Pac. 564]; *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118, [118 Pac. 526]; *Hershey v. Bristol*, 162 Cal. 110, [121 Pac. 371].)

In *Harrison v. Cousins*, 16 Cal. App. 515, [117 Pac. 564], this court granted a motion to dismiss the appeal, but in *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118, [118 Pac. 526], it is pointed out by the supreme court that the more appropriate order is an affirmance of the order appealed from.

The order appealed from is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 919. First Appellate District.—February 13, 1912.]

WILLIAM J. ROSS, Respondent, v. THE BOARD OF EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO, JOSEPH O'CONNOR, MARY KINCAID, THOMAS HAYDEN, and THOMAS H. BANNERMAN, as Members of and Constituting Said BOARD OF EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO, Appellants.

BOARD OF EDUCATION—STOREKEEPER EMPLOYED UPON MONTHLY SALARY—WANT OF POWER TO DISMISS DURING MONTH AND APPORTION SALARY.—The board of education of the city and county of San Francisco, after employing a storekeeper from month to month upon a monthly salary, has no power to dismiss him without cause, pending any month, and to apportion his salary for such month to the part of the month preceding his dismissal, and thus deprive him of his full salary for such month. The only power of dismissal without cause is at the expiration of a monthly term of employment.

ID.—RULE AS TO MONTHLY TERM OF EMPLOYMENT APPLICABLE—CONSTRUCTION OF CODE.—The ordinary rule that an employee who is employed by the month is entitled to his salary for the full month, when he is discharged without cause before the expiration of the month, applies in case of employees of a school district or of a board of education; and there is nothing in section 1617 of the Political Code, defining their rights and duties, which exempts their contracts of employment of other persons than teachers from the operation of the ordinary rules of law applicable to the interpretation and enforcement of contracts of employment in general.

ID.—BREACH OF MONTHLY CONTRACT—ACTION FOR DAMAGES—REMEDY BY MANDAMUS.—Though an action for damages would lie for breach of a monthly contract of employment by a board of education, yet as such remedy would not be equally as convenient, beneficial and effective as the remedy by *mandamus* to compel the board of education to draw upon the school fund for the residue of the salary wrongfully withheld by them in breach of their official duty from the salary of the storekeeper employed by them upon a monthly salary, that remedy will lie upon his petition therefor.

ID.—DISCHARGE WITHOUT CAUSE PROPERLY DETERMINED BY TRIAL COURT. Upon petition for the writ of *mandamus* allowed by the trial court, that being the only adequate remedy available to the petitioning plaintiff, the question as to whether he was discharged without cause and in violation of the contract of employment was properly tried and determined in the court below, and its judgment enforcing the writ of mandate will be affirmed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Percy V. Long, City Attorney of San Francisco, and D. S. O'Brien, Assistant City Attorney, for Appellants.

Edward J. Lynch, for Respondent.

LENNON, P. J.—In this proceeding the plaintiff was awarded a peremptory writ of mandate, commanding and compelling the defendants, in their official capacity as members of the board of education of the city and county of San Francisco, to approve his demand upon the common school fund of the school district of said city and county in the sum of \$100, which it was alleged was the balance due him for salary under a previously existing contract, whereby the plaintiff was employed by the defendants as storekeeper for said board of education. In the court below the defendants interposed a general demurrer to plaintiff's petition for a writ of mandate, specifying as ground of demurrer only the insufficiency of the facts stated to warrant the issuance of the writ. Upon the demurrer being overruled, the defendants filed an answer, which in effect admitted that all of the allegations of the plaintiff's petition were true. The case comes here upon an appeal from the judgment and upon the judgment-roll alone.

The petition for the writ, after alleging the facts necessary to show the legal entity and powers of the defendants as an integral part of the state's educational system, pleaded the contract whereby the plaintiff was employed by the defendants from month to month at a salary of \$150, payable monthly on the first day of each and every month, and that thereafter in the month of September, 1909, and before the expiration of the month, the defendants without cause discharged the plaintiff from his position. Thereafter, the petition alleges, the defendants, upon presentation, approved plaintiff's demand against the common school fund of the school district of the city and county of San Francisco for the sum of \$50 as salary for one-third of the month of September, 1909, but refused to approve said demand upon said fund for

the \$100 additional, claimed as the remainder of the salary due plaintiff under his contract for the balance of said month of September.

No question of want of funds is involved in the defendants' refusal to approve plaintiff's demand.

Although the cause of action set out in the plaintiff's petition is founded upon the contract, the prayer of the petition is framed upon the theory that upon proof of the contract and its breach the defendants can be compelled by *mandamus* to honor plaintiff's demand, and upon that theory the case was tried and determined.

The first point presented in support of the appeal involves the power of the defendants as a board of education to prematurely dismiss without cause and without pay an employee, whose services were contracted for from month to month at a fixed monthly salary. It was the contention of the plaintiff, concurred in apparently by the trial court, that the employment of plaintiff could be terminated without cause and his salary suspended only upon the expiration of the term for which he was employed. It is not disputed by the defendants that ordinarily an employee employed by the month is entitled to his salary for the full month when he is discharged without cause before the expiration of the month, but it is insisted that section 1617 of the Political Code creates a different rule in the case of employees of a school district, and must control and conclude the rights of the parties here. That section in substance defines and fixes the rights and duties of boards of education in many matters, including the power to employ janitors and other employees, and to fix and order paid their compensation. There is nothing, however, in this section—and we have not been cited to any other provision of either the general or the school law of the state—which exempts the contracts of a school board, other than those involving the tenure of a teacher's employment, from the application and operation of the rules of law which ordinarily obtain in the interpretation and enforcement of contracts of employment generally. The fact that the plaintiff was discharged without cause before the expiration of his term of employment, and has been at all times—as is admitted by the pleadings—ready, willing and able to perform his duty in compliance with his contract, undoubtedly gave him a cause of action upon and for

breach of the contract; and if the case had been tried and determined solely upon that theory, a judgment for damages for the breach would be sustained. (*Stone v. Bancroft*, 112 Cal. 652, [44 Pac. 1069], 139 Cal. 78, [70 Pac. 1017, 72 Pac. 717]; *Hancock v. Board of Education*, 140 Cal. 554, [74 Pac. 44].)

The defendants on this appeal also contend that if the plaintiff could have maintained an action for damages for breach of the contract, then such action would have afforded plaintiff a plain, speedy and adequate remedy, and consequently the remedy by *mandamus* is not available.

Ordinarily this would be so; but the general rule that *mandamus* will not lie where any other remedy is provided is subject to the qualification that *mandamus* may be invoked in those cases where the remedy by any other form of action or proceeding would not be equally as convenient, beneficial and effective. In other words, the remedy by *mandamus* will be denied only when the party seeking relief has a plain remedy at law which is not only speedy but adequate in the sense that in and of itself it is capable of directly affording and enforcing the relief sought; and if it be found that the remedy at law, although it could and might result in a judgment for plaintiff, is nevertheless inherently incapable of compelling the performance of the specific act which forms the subject matter of an application in *mandamus*, it cannot be said that the remedy at law is equally convenient, beneficial and effective to the extent that it will supersede the remedy by *mandamus*. (*Fremont v. Crippen*, 10 Cal. 211, [70 Am. Dec. 711]; *Babcock v. Goodrich*, 47 Cal. 488; *Raisch v. Board of Education*, 81 Cal. 542, [22 Pac. 890]; *Robertson v. Trustees*, 136 Cal. 403, [69 Pac. 88].)

It was upon this interpretation of the rule which governs in *mandamus* that the supreme court, in *Raisch v. Board of Education*, 81 Cal. 546, [22 Pac. 890], held that *mandamus* was the proper and only adequate remedy to compel a board of education to draw a draft for supplies furnished pursuant to a contract made with the board. In the case at bar the defendants were undoubtedly authorized to enter into the contract in suit; and if the plaintiff had not been discharged and had continued in the service of the defendants until the end of the month, it would not be disputed that he would be entitled to the full salary due him under the contract. Hay-

ing performed all of the conditions required of him by the contract, he could not rightfully be discharged without cause and thereby deprived of the balance of the salary due him under the contract. In legal effect, therefore, his position with reference to the payment of the salary contracted for was the same as if he had not been discharged. In either event he would be entitled to the full salary, but he could be paid under the law only by a demand upon the school fund signed and approved by the defendants. This being so, the contract must be construed "to be one to draw drafts and not to pay money directly." It follows that no ordinary action which the plaintiff might have had against the defendants individually or as a board for breach of the contract would be "equally convenient, beneficial and effective as the proceeding by *mandamus*, since it would not have compelled the board to do what it had contracted to do and what official duty required them to do." (*Raisch v. Board of Education*, 81 Cal. 542, [22 Pac. 890]; *Apgar v. Trustees*, 34 N. J. L. 308; *Merrill on Mandamus*, secs. 109, 115, pp. 130, 140.)

The rule declared in *Raisch v. Board of Education*, 81 Cal. 546. [22 Pac. 890], has never been reversed or doubted in any subsequent opinion of the supreme court; and we are unable to discern any material distinction between that case and the case at bar. In effect both cases are founded upon a violation of official duty amounting to a breach of contract; and, with the single exception that in the present case the plaintiff's contract was for services rather than merchandise, both cases are identical in point of fact and in the nature of the relief prayed for. If in the cited case last referred to *mandamus* had been sought to compel the payment of the contract price of personal services instead of supplies furnished, we apprehend that the decision would have been the same.

Mandamus being the only adequate remedy available to plaintiff, the question as to whether or not he was discharged without cause and in violation of the contract was properly tried and determined in the court below. (See Code Civ. Proc., sec. 1090; *Raisch v. Board of Education*, 81 Cal. 542, [22 Pac. 890]; *Bannerman v. Boyle*, 160 Cal. 197, [116 Pac. 732].)

The judgment appealed from is affirmed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 1057. Second Appellate District.—February 13, 1912.]

**GEORGE G. POOL, Respondent, v. PHOENIX REFINING
AND MANUFACTURING COMPANY, a Corporation,
Appellant.**

**ACTION FOR DAMAGES—BREACH OF CONTRACT TO PURCHASE MERCHAN-
DISE SHIPPED—RESCISSION—INSUFFICIENT COMPLAINT—VALUE NOT
STATED.**—A complaint in an action to recover damages for breach
of a contract to receive and pay for a carload of merchandise shipped
by the plaintiff from its factory at Steubenville, Ohio, to the order
of the defendant at Bakersfield, California, which was rescinded by
plaintiff for such breach, should allege that such merchandise was
of no greater value in the market than the agreed purchase price
when the contract was rescinded, in order to recover as damages
moneys paid out by the vendor on account of the breach, and where
it states no value of the property at all, it fails to state a cause of
action for any damages, and the court erred in overruling a general
demurrer thereto.

**ID.—AGREEMENT TO PAY FREIGHT CHARGES NOT SEVERABLE FROM PUR-
CHASE PRICE TO SUPPORT ACTION.**—The agreement to pay the freight
charges in addition to the price of the merchandise at the factory,
upon its shipment to this state, became a part of the purchase price
in this state, and is not severable therefrom to sustain the action
for breach upon rescission of the contract of purchase in this state,
without an averment of the value of the merchandise at that time,
which might have been worth much more than the price then agreed
to be paid for it in the absence of such averment.

APPEAL from a judgment of the Superior Court of Kern
County. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

E. L. Foster, for Appellant.

Joseph H. Tam, for Respondent.

JAMES, J.—This appeal was taken by the defendant from
a judgment and is presented upon the judgment-roll alone.
To the complaint of plaintiff defendant interposed a de-
murrer, setting forth as a ground thereof that said complaint
did not state facts sufficient to constitute a cause of action.
The demurrer was overruled and defendant answered, after

which the cause went to trial. On this appeal the question to be considered is as to whether the trial court was right in overruling the demurrer of defendant to the complaint of plaintiff.

Plaintiff acquired title to a claim of the Union Hardware and Metal Company, by assignment thereof, upon which he brought suit demanding judgment in the sum of \$485.52, which the trial court awarded to him, together with interest and costs. The facts which constituted the alleged cause of action were, in substance, as follows: In June, 1908, defendant ordered from the Union Hardware and Metal Company a carload of merchandise, consisting of steel sheets, which was to be shipped by the vendor from its factory at Steubenville, Ohio, to defendant at Bakersfield, California; defendant agreed, upon the receipt of the merchandise at the city of Bakersfield, to pay the amount of the agreed purchase price, being the sum of \$1,761.81, together with freight charges which might be made on account of the shipment. The merchandise was shipped and arrived at the city of Bakersfield in August, 1908. The defendant, notwithstanding it had notice of the arrival thereof, failed and refused to pay the freight charges, or to receive the merchandise, and the same remained in charge of the railroad company for the period of seventy-six days at that point. Thereafter, the Union Hardware and Metal Company paid the charges which had accrued, both those made for the transportation of the merchandise and demurrage accruing during the seventy-six days that the car was at the city of Bakersfield. The merchandise was then forwarded to the Union Hardware Company's warehouse in the city of Los Angeles. It was alleged further in the complaint that the freight rates and charges from the city of Steubenville, Ohio, to the city of Bakersfield were \$204.76 in excess of freight rates which would have been charged had the shipment come directly from the city of Steubenville to the city of Los Angeles; that, further, the Union Hardware and Metal Company was obliged to pay additional freight charges of \$204.76 for the transportation of the freight from the city of Bakersfield to the city of Los Angeles, making a total, including interest on the amounts mentioned, of \$485.52. This action was in form an action for damages arising upon breach of contract of a vendee to receive and pay for personal

property, which contract the vendor elected to rescind because of such breach. The complaint contained no allegation respecting the value of the carload of merchandise, and for aught that appears therein plaintiff or his assignor may not have suffered any damage at all; that is, the carload of merchandise may have been worth a great deal more than the price agreed to be paid for it by the defendant when plaintiff's assignor rescinded the contract and took back its property. (Civ. Code, sec. 3358.) The contract as alleged was a contract for the sale of personal property for which defendant was to pay a certain stipulated sum, and in addition thereto, the freight charges which would accrue upon the arrival of the shipment at the city of Bakersfield. If in the complaint it had been shown by proper allegation that the merchandise was of no greater value in the market to plaintiff's assignor than the agreed purchase price, at the time the contract was rescinded, then, of course, the amounts of money paid out by the Union Hardware and Metal Company on account of the failure of defendant to discharge fully its obligations under the contract would properly be recoverable as damages. Irrespective of the provisions of the Civil Code determining the measure of damages in various cases where a vendee refuses to receive and pay for personal property sold to him (Civ. Code, secs. 3310, 3311), it is clear that the plaintiff in this case has not alleged facts from which it can be reasonably inferred that any damage at all was suffered by his assignor. The agreement to pay freight charges cannot be separated from the main contract of purchase and treated as a distinct obligation assumed on the part of the vendee. The agreement to pay freight charges formed a part of the consideration of the sale. We think that the trial court erred in overruling the demurrer to the complaint.

The judgment is reversed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 962. Second Appellate District.—February 13, 1912.]

EDWIN B. HIXSON, Appellant, v. CLARA W. HOVEY and
G. C. HOVEY, Her Husband, Respondents.

SPECIFIC PERFORMANCE—CONTRACT CALLING FOR SUFFICIENT TITLE—CERTIFICATE SHOWING ENCUMBRANCE—ACTION NOT SUSTAINABLE.—A contract for the sale of land cannot be specifically enforced against the vendee where it provides that the seller upon payment "agrees to deliver a certificate of title showing the title to be vested in the seller and to execute and deliver to the buyer or her assigns a good and sufficient deed of bargain and sale," if the certificate of title tendered showed an encumbrance existing against the land by deed of grant of the right of a third party to lay and maintain water-pipes through the land. The words "title vested in the seller" import necessarily a good title, which is free from encumbrance.

ID.—IMPLIED CONDITION IN EXECUTORY CONTRACT OF SALE OF LAND—BURDEN OF PROOF.—In every executory contract to sell land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unencumbered and without defect; and the vendor is bound to satisfy that implied condition and make proof of an unencumbered title without defect, before he can be entitled to a decree for specific performance of the contract.

ID.—PURCHASER NOT ESTOPPED BY FAILURE SPECIFICALLY TO OBJECT TO TITLE TENDERED BEFORE SUIT.—Where the vendor in his complaint alleged that he had performed all of the terms and conditions of his contract, and was still ready and willing to perform the same, and his proof failed to sustain his right to recovery, he cannot complain that the failure to sustain the burden of proof resting upon him was aided by an estoppel of the purchaser by failure to object specifically to the defect in the title, at the time of the tender of the certificate of title and deed before suit. Such failure cannot affect the obligation of the vendor, or permit him to enforce any different contract from that expressed in the writing.

ID.—CONSTRUCTION OF CODE AS TO WAIVER OF SUFFICIENCY OF TENDER—QUESTION OF COSTS AND RIGHT TO SUE.—The provisions of section 2076 of the Code of Civil Procedure, touching a waiver by failing to object to the form of a tender, are mere rules of evidence affecting the question of costs and the right to sue where a tender is necessary before suit. It cannot help a suit in which no sufficient performance or offer to perform is shown by the plaintiff, and no cause of action for specific performance is proved.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Roland G. Swaffield, for Appellant.

George A. Skinner, and E. S. Williams, for Respondents.

JAMES, J.—This appeal was taken from a judgment entered in favor of defendants and from an order denying the motion of plaintiff for a new trial.

On the fifteenth day of November, 1906, one C. I. Thorp, as vendor, entered into a written contract with defendant Clara W. Hovey, whereby it was agreed that Thorp would sell and convey to said defendant a certain lot of land. The purchase price was to be paid in several installments at different dates subsequent to that upon which the contract was made. Thorp was then the owner of the property which was made the subject of the agreement and he later conveyed the same to this plaintiff, and also assigned the contract of sale for the lot mentioned, to the latter. Default having been made in the payment of the larger part of the consideration named in the contract of sale, plaintiff made tender of deed and certificate of title on March 17, 1910, to Clara W. Hovey, and demanded payment of the amounts due. Upon payment being refused, this action was brought to compel specific performance. Plaintiff in his complaint alleged that he had performed all of the conditions precedent on his part to be performed, and that he had made tender of sufficient deed and a certificate showing title to the lot to be vested in him prior to the commencement of the action, and that he was ready, able and willing to comply with the terms of his contract. He deposited with the clerk of the court a deed and the certificate of title for the benefit of defendant Clara W. Hovey, and prayed for judgment for the balance of the purchase price and interest. The answer specifically denied all of the material allegations of plaintiff's complaint. The court in its findings, among other facts, determined that the plaintiff had not performed all the conditions required to be performed on his part, and that he had not offered to perform all of such

conditions, or to deliver to Clara W. Hovey "any good and sufficient deed of grant, bargain and sale to, and which would convey said property to said Clara W. Hovey, freed and unencumbered from all liens and adverse claims and rights thereto . . . that neither said plaintiff nor said C. I. Thorp, has at any time offered to deliver to said Clara W. Hovey a deed as aforesaid, nor a certificate of title showing the title to said property to be vested in either C. I. Thorp or the plaintiff." The principal attack of appellant is made upon the finding which we have quoted, and it is claimed that the evidence was insufficient to support the conclusions therein reached by the trial judge. The written contract of sale executed between Thorp and Clara W. Hovey contained this provision: "The seller on receiving the full payments at the times and in the manner above mentioned, agrees to deliver a certificate of title showing the title to be vested in seller and to execute and deliver to the buyer, or her assigns, a good and sufficient deed or grant, bargain and sale." The evidence disclosed that the certificate of title tendered by the plaintiff prior to suit brought, and which was thereafter offered in court, showed an encumbrance existing against the lot, which consisted of a right of way to lay water-pipes and maintain and repair the same, which right had been granted theretofore to the Alamitos Water Company by deed duly executed and recorded. Under the contract of sale defendant Clara W. Hovey was entitled to receive the property free and clear of all encumbrance; when it was provided that the certificate should show "title to be vested in seller," that term necessarily meant a good title, or one which was free from encumbrance. "In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee, by his deed of conveyance, a title unencumbered and without defect." (*Easton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280], and cases there cited.) But appellant contends that because it was not specifically objected at the time of the tender, that the offer was refused on account of defect in title, Clara W. Hovey in this action would be estopped from raising the question as to the sufficiency of such tender. But the condition implied in the executory contract of sale, that a clear and unencumbered title should be conveyed, was one which the plain-

tiff was bound to satisfy and make proof of before he was entitled to a decree requiring the defendant Clara W. Hovey to specifically perform her agreement. He alleged in his complaint that he had performed all of the terms and conditions of the agreement, and that he was still ready, able and willing to perform the same. The certificate of title which he tendered in court with the deed, however, did not support these allegations made upon his part, and he therefore failed to make out an item of proof essential to a recovery. Because he had tendered instruments showing defective title, and objection because of the defect had not been specifically pointed out prior to suit, did not work a change in his obligation in that regard, or permit him to enforce any different contract against Clara W. Hovey than that which was expressed in the writing of which he had become the assignee. Referring to section 2076 of the Code of Civil Procedure, touching matters which shall be deemed to be waived by a party failing to object to the form or sufficiency of a tender, the supreme court in *Colton v. Oakland Bank of Savings*, 137 Cal. 376, [70 Pac. 225], says: "These provisions of the Code of Civil Procedure are mere rules of evidence affecting the question of costs and the right to bring actions in cases where a tender is necessary before commencing the action." The trial court, therefore, was right in its determination that there had been no sufficient performance, or sufficient offer to perform, made by the plaintiff. As the finding which was made adverse to appellant upon that issue must be sustained, the other questions urged on this appeal need not be considered.

The judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 879. Third Appellate District.—February 15, 1912.]

**MARIA S. NETO, Appellant, v. CONSELHO AMOR DA
SOCIEDADE NO. 41, etc., et al., Respondents.**

VOLUNTARY BENEFICIAL SOCIETY—CONDITION OF MEMBERSHIP—EXPULSION FOR JOINING SIMILAR SOCIETY—PROPER REGULATION—AGREEMENT—PRESUMPTION.—Where under the constitution and laws of a voluntary, social, fraternal and beneficial society, it was made a condition of membership therein that expulsion should follow the joining of another similar organization, it is held that such regulation is not opposed to public policy, or to any provision of law, and is within the scope of the charter provisions of the organization, which constitute the agreement of its members, each of whom is presumed to know the terms and conditions upon which he may retain his connection with the organization.

ID.—POWER OF MEMBERS OF VOLUNTARY ASSOCIATION.—Individuals who form themselves into a voluntary association may agree to be governed by such rules as they see fit to adopt, so long as they are not immoral, or contrary to public policy or the law of the land, and may prescribe the conditions upon which membership may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, and the tribunal and mode in which offenses shall be determined, and the penalty enforced.

ID.—VIOLATION OF RULES BY MEMBER—EXPULSION—MISTAKE OF LAW—EXHAUSTION OF REMEDIES REQUIRED BEFORE SUIT—DEFENSE.—Where a member has violated the existing rules of a voluntary society by joining another similar society, such member's mistaken view of the existing law cannot affect a judgment of expulsion, and a member who has been tried and found guilty of such violation must first exhaust all the remedies prescribed by the constitution and rules of the society regulating expulsion, before seeking relief in a state court, and the failure to do so would be a complete defense to any suit for relief therein.

ID.—REMEDY BY MANDAMUS—EQUITABLE NATURE—IMPROPER APPLICATION.—A member who has been expelled and has failed to exhaust the remedies prescribed by the order in relation thereto, and who admits the violation of the rules of the order, providing for expulsion, and merely claims that the expulsion was irregular, cannot invoke the remedy by *mandamus* to compel a reinstatement of such member. The remedy so sought is of an equitable nature, which presupposes a wrong to be redressed and a right to be restored; and a petitioner therefor who, while continuing to violate rules requiring expulsion, assumes the attitude of seeking to annul an irregular expulsion, in order to be regularly expelled, is not entitled to the writ of mandate for such a vain and nugatory purpose.

ID.—DESIGN OF WRIT OF MANDATE—SUBSTANTIAL JUSTICE.—The writ of mandate is not to be issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injury.

ID.—SUBSTANTIAL RIGHTS OF APPELLANT NOT INVADED.—It is held on petition for rehearing that no substantial rights of the appellant appear to have been invaded.

APPEAL from a judgment of the Superior Court of Mendocino County, and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Louis Gonsalves, T. J. Weldon, and W. D. L. Held, for Appellant.

F. L. De Freitas, and Langan & Mendenhall, for Respondents.

BURNETT, J.—Respondent, Conselho 41, is a social, fraternal and beneficial organization composed of Portuguese women. Of this appellant became a member on the fifteenth day of September, 1901, and retained her membership therein until January 20, 1907, when she was expelled. On the 1st of July, 1906, appellant became a member and the president of another similar organization known as the U. P. E. C., and which for the sake of brevity, will be referred to hereafter as the U. P.'s. For the same reason we shall designate respondent association as the S. P.'s. In July, 1901, the supreme council of the S. P.'s adopted a resolution reciting that "Whereas, the society of Portuguese ladies known by the initials U. P. E. C. was organized through spite," etc., "Be it resolved that there shall not be admitted into this society any more ladies belonging to the former society. And be it further resolved that no member of this society shall belong to the former under penalty of expulsion." With some elaboration this was formally made a part of the constitution and by-laws by the action of the grand council of the order in July, 1903. When the local society was organized the members present, including appellant, were informed by the installing officer that it was a law of the order that a lady belonging to the S. P.'s could not join the U. P.'s under pen-

alty of expulsion. In appellant's application for membership she declared, among other things, that she accepted and acknowledged "that the statement of the laws and regulations of the society constitute an express condition without which I shall have no right to participate or enjoy the benefits or any privileges of same." That such regulation is not opposed to public policy, does not contravene any provision of law and is within the scope of the charter provisions of the organization is not controverted nor does it admit of serious question. Nor will anyone dispute, what the authorities hold, that individuals who form themselves into a voluntary association, may agree to be governed by such rules as they see fit to adopt, so long as they are not immoral, contrary to public policy or the law of the land. As said in *Lawson v. Hewell*, 118 Cal. 618, [49 L. R. A. 400, 50 Pac. 764], through Mr. Justice Harrison: "Individuals who associate themselves in a voluntary fraternal organization may prescribe conditions upon which membership in the organization may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offenses shall be determined and the penalty enforced. These rules constitute their agreement, and unless they contravene some law of the land are regarded in the same light as the terms of any other contract." The rule is, also, that a member is presumed to know the terms of membership and the conditions under which he may retain his connection with the organization. It may be observed, though, that we have here, in addition, evidence of the positive knowledge by appellant of the inhibition as to membership in the other order.

Some time in July, 1906, appellant proffered her dues for membership to the S. P.'s, but they were rejected on the ground that she belonged to the U. P.'s, the president telling her that if she wanted to belong to the former order she must leave the latter, but appellant said she would not, that she belonged to both and always would. Thereafter, on September 16, 1906, written charges were preferred against her in which her membership in the proscribed order was alleged, and a committee of investigation and trial was thereupon appointed in accordance with the rules of the association. She was served with a copy of the charges and notified of the time,

September 17th, set for the hearing by the committee. She appeared at the time and place designated in the notice and, upon the charges being read to her, she replied: "I belong to the U. P. P. E. C. and I will give my decision as the constitution demands." The committee informed the accused that if she desired further time to make further defense it would be granted her. The further hearing was thereupon continued till September 20th, and the accused did not appear. At this last meeting it is at least questionable whether a quorum of the committee was present, but this seems entirely immaterial, as it was simply for the purpose of affording appellant a chance to offer any explanation of her admitted conduct. She declined to take advantage of the opportunity. Her statement to the committee amounted virtually to a plea of guilty to the charge. Manifestly no further evidence was required and the committee reported the proceedings to the council, and upon a unanimous vote, appellant was expelled, as aforesaid. According to the by-laws, the accused was allowed one month to present further evidence to the council to refute the report of the committee, and she had the privilege also within one month of appealing from the judgment of expulsion to the supreme president or to the supreme council. She took no step in either direction, but, more than two years after she was expelled, she filed her petition for a writ of mandate for restoration to membership. This was denied, and hence the appeal. Some objections are made to the proceedings of the committee, but we deem it unnecessary to notice them in detail. They have, however, not escaped our attention. The trial was somewhat less formal than we would expect in a court of justice but no substantial right of appellant was invaded. Every step was taken that is required by the laws of the order. Indeed, if everything had been done exactly as advocated by appellant, the result must have been the same, because there is no kind of pretense that she was not guilty of the charge. Even in her testimony taken at the trial in May, 1909, she said: "The Mendocino Council U. P. P. E. C. was organized the first Sunday of July, 1906, with nineteen members, and I was elected president." She further declared that when she appeared before the committee as aforesaid and was asked if she belonged to the U. P. P. E. C. she answered "yes, and I am still a member of the U. P. P. E. C. and have been since

I first joined." The whole proceeding, in fact, shows that there was no controversy as to her membership in the U. P.'s or that she intended to continue as such. Her attempted justification at the trial was that when she joined the U. P.'s she accepted the law to be as contained in the 1900 edition of the constitution of the S. P.'s given her by the organizer of the local council. This did not contain the provision in question, since the amendment was adopted, as we have seen, in July, 1901. Her mistaken view of the law cannot affect, of course, the judgment of expulsion.

Again, since she was regularly tried according to the regulations of the order, she should have "exhausted the remedies prescribed by the constitution and by-laws of said defendant relative to her alleged expulsion." She alleged in her complaint that she had done so, but this is directly opposed to the evidence.

In *Levy v. Magnolia Lodge I. O. O. F.*, 110 Cal. 307, [42 Pac. 890], it is said: "Yet the fact that the laws of the lodge provided a remedy for the grievance complained of, which he had not pursued and exhausted, would have been a perfect defense to his action in any state court [citing cases]. On the same principle, courts of equity decline to interfere with voluntary benevolent associations so long as the means of relief provided by the society itself have not been availed of and exhausted. (*Lafond v. Deems*, 81 N. Y. 507; *Dolan v. Court of Good Samaritan*, 128 Mass. 437; *Chamberlain v. Lincoln*, 129 Mass. 70.)"

In *Lawson v. Hewell*, 118 Cal. 613, [49 L. R. A. 400, 50 Pac. 763], also, it is declared: "The proceedings against the plaintiff are shown by the complaint to have been taken in strict accordance with the rules of the order. He has received notice of the hearing and he has shown no facts which authorize the conclusion that he will not receive a fair and impartial hearing. From the decision at that hearing he can seek redress by an appeal to the grand chapter. So long as he has this right of redress within the order he has no right to invoke the aid of the courts."

This rule, it may be said, does not apply where the order has violated its own laws and regulations and has arbitrarily invaded private rights, as was the case in *Schou v. Sotoyome Tribe*, 140 Cal. 254, [73 Pac. 996], where it was justly held

that "Although, as a general rule, one who has become a member of a benevolent order is not entitled to appeal to the courts for redress until after he has adopted the lawful procedure and exhausted the lawful remedies prescribed by the constitution and by-laws of the order; yet where sick benefits were sought on behalf of an insane member by his wife as guardian of his person and estate, and the order violated its own laws in not giving her any notice or opportunity to produce testimony in behalf of her husband before an adverse decision against him in the order, and on appeal to the great council, the court has jurisdiction to hear and determine the merits of the controversy." Here, as we have seen, the charges were preferred, notice given, hearing had, report made by the committee, and expulsion adjudged substantially in accordance with the rules of the order. If we admit that there was any informality in the proceeding, it does not carry us beyond the conclusion that appellant should have pursued the remedies provided by the regulations of the society.

Again, the trial court would be justified in taking this view of the situation: The remedy sought by appellant is equitable in its nature. It presupposes a wrong to be redressed, a right to be restored. Its invocation is based upon the assumption that appellant is entitled to the privileges of which she has been despoiled, that she has not forfeited her claims to membership in the order, and that justice and reason require her restoration to her former status. The proof, however, upon which was predicated the demand for the issuance of this extraordinary equitable remedy, discloses the fact that appellant admitted before the committee that she was guilty of the offense charged, and at the time of the trial herein—more than two years after her expulsion—as we have seen, she declared under oath that she was still a member of the other society, thereby revealing her continued violation of the by-law in question. Her position, then, before the court assumed the attitude of one seeking the annulment of an irregular expulsion in order that she might be regularly expelled. The writ of mandate should not be issued for such a vain and nugatory purpose. It is not issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injury. (*State ex rel. Young v. Temperance Ben. Assn.*, 42 Mo. App. 485; *Burton v. St. George Society*, 28 Mich. 261.)

Some other considerations are discussed by counsel, but we can see no substantial merit in the appeal and the judgment is, therefore, affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 15, 1912, and the following opinion then rendered thereon:

BURNETT, J.—In her petition for rehearing appellant calls attention to the fact that, contrary to a recital in the opinion heretofore filed herein, it was expressly admitted by respondents at the trial of this action that the charges preferred against her were not read to appellant by the investigating committee. The statement in the opinion was based upon the recitals in the minutes of the council containing the report of the committee. These minutes were admitted in evidence, and it appears therein that "a copy of the charges was duly served on the accused sister, and she with the committee met at the city of Mendocino, county of Mendocino, state of California, on the seventeenth day of September, 1906. *The charges were then read to the accused sister by a member of the committee,*" etc. But the matter seems to be entirely immaterial, as she had been served with a copy of the charges and there is no contention that she was not fully informed of the nature of the accusation or that the laws of the order required the charges to be read to her by the committee.

Appellant makes a distinction between being a member and *persisting* in being a member of the proscribed order. However, since she admitted she was a member of the U. P.'s and manifested no inclination or purpose to give up her membership therein, it seems reasonable to conclude that she intended to "persevere" in said connection. It may be remarked, also, that the record shows that some time before the charges were preferred against her, she attended a meeting of the S. P.'s, and tendered her dues to the secretary, who refused to accept them on the ground that appellant had joined the U. P.'s. The president told her "if she belonged to ours she must leave the other," and she said: "I won't; I belong to the two and I always will." While this evidence was not taken by the committee at the investigation, it illustrates the attitude of appei-

lant during the entire period covered by the trial before the superior court.

If, as contended by appellant, her answer to the committee should be construed as expressing a purpose "to conform to the laws of defendant society in thirty days," it would be difficult to explain why she made no attempt to do so. The by-laws provided that "To the report of the committee the accused can present her further evidence and refutation within a month; and the council shall say if the committee erred or not, shall submit the case to the same or another committee or shall proceed anew with the trial." She did not avail herself of this privilege nor appeal in any way to the constituted authorities of the order.

It cannot be said that hasty action was taken by the council, as appellant was not expelled till more than three months after the report of the committee was made. And while, as already stated, the proceedings in a few particulars were somewhat inartificial, no substantial right of appellant seems to have been invaded, and we think the court was justified in denying the writ.

The specific points made by appellant have been examined, but, as we view the matter, no sufficient reason has been presented for a rehearing of the case. The petition is therefore denied.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 13, 1912.

[Civ. No. 880. Third Appellate District.—February 15, 1912.]

E. M. STEVENS, Respondent, v. SELMA FRUIT COMPANY, INC., a Corporation, Appellant.

COMMERCIAL CORPORATION—POWER OF OFFICER TO EXECUTE NOTE—RECORD AUTHORITY NOT CONFERRED—IMPLICATION—POWER TO TRANSACT BUSINESS.—Although no record proof appears that any particular officer of the defendant, as a commercial corporation, was specifically authorized by its board of directors to execute notes on its behalf, yet, upon the question of implied authority, it is to be considered that the very nature of commercial corporations requires that the authority to transact their ordinary business affairs shall be vested in one or more persons; and its president or general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes.

ID.—INFERENCE FROM GENERAL AUTHORITY.—Where authority to do some particular act, which is included within the ordinary affairs of a commercial corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer authority upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation to perform such particular act will be inferred from the general authority so given.

ID.—OFFICER HELD OUT BY CORPORATION AS HAVING GENERAL AUTHORITY—OSTENSIBLE AUTHORITY—ESTOPPEL.—Where an officer of a corporation is held out by the corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of the officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him.

ID.—ACTION OF SECRETARY AND MANAGER IN EXECUTING NOTES UNDER SEAL—PRESUMED KNOWLEDGE OF DIRECTORS—SANCTION.—In an action upon a note of the defendant corporation executed by its secretary and manager, under the corporate seal, representing the proceeds of fruit shipped by the corporation, the money for which was collected and held by it, where such secretary and manager testified that he had as such officer executed other notes for the corporation under its seal, as acts of the corporation, and that his authority to do so was never questioned by the board of directors or by its president, the board must be presumed to have had knowledge of such acts, and to have authorized the same, as the course of the corporate business may require.

ID.—REASONABLE CONSTRUCTION OF RESOLUTION OF DIRECTORS—IMPLIED POWER OF MANAGER TO EXECUTE NOTES.—It is held that under a reasonable construction of a resolution of the board of directors of the defendant corporation, its manager had implied power to execute notes in the conduct of its business in favor of parties to whom it became indebted, where by its terms he was authorized "to purchase the necessary supplies and to buy and sell the goods and products in which the corporation intends to deal," and was given "the immediate direction of said operations," and it was provided "that the authority of its president shall be exercised over and through its manager, so long as he shall properly conduct said business and operations."

ID.—RATIFICATION OF NOTE IN SUIT BY PRESIDENT.—Where there is no question as to the power of the president of the corporation to execute a note in its behalf, and the fact is undisputed in the record that the president authorized the manager to pay the note in suit, as a liability of the corporation upon its maturity, he thereby ratified the act of the manager in executing the note.

ID.—CONTRACT BY FORMER CORPORATION FOR SALE OF RAISINS—BUSINESS ASSUMED BY DEFENDANT—DELIVERY AND COLLECTION—NOTE—UN-UTENABLE DEFENSE.—Although a contract for the sale of raisins belonging to a firm of which plaintiff was a member was made by a former corporation, whose business was taken over by the defendant, as a new corporation, as of a date when said contract had not been executed by delivery, and defendant, after the organization, delivered the raisins to the party who had contracted therefor, and collected the money, which it wished to retain in its business, and upon settlement therefor the note in suit was given, a defense to the note on the ground that defendant had no relation to the contract of the former corporation and that the note is without consideration is untenable.

ID.—PRESUMPTION OF CONSIDERATION OF NOTE—BURDEN OF PROOF NOT SUSTAINED.—The note in suit is presumed to have been given for a sufficient consideration, and defendant has the burden of proof to show that it was given without consideration. That burden is not sustained where it appears unquestionably that the note was given for money collected by defendant which belonged to plaintiff's firm and was borrowed by defendant therefrom.

ID.—IMMATERIAL QUESTION—ACTION OF DEFENDANT AS BROKER.—In such case, the question whether the defendant in delivering the raisins in execution of the former contract with the former corporation, and in collecting the money therefor, acted as a broker in the sale of the raisins or not is immaterial.

ID.—ASSIGNMENT OF FIRM RIGHT TO PLAINTIFF BY COPARTNER.—Where both members of the firm of Stevens & Son, with which the settlement was made by defendant, and to which its note in suit was

given, testified that before the commencement of the action R. E. Stevens, the son, transferred and assigned all his interest in the account and note in question to his father, E. M. Stevens, who is plaintiff in the action and respondent upon appeal, it is held that such assignment was valid and vested the sole ownership of the account and note in plaintiff. It was not necessary that the assignment should have been made by the firm.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

M. K. Harris, and N. C. Coldwell, for Appellant.

M. G. Gallaher, Everts & Ewing, and S. L. Strother, for Respondent.

HART, J.—The complaint in this action counts upon two causes of action, viz.: 1. Upon a promissory note for the sum of \$2,902.55, payable one hundred days after the date of its execution, October 5, 1908, together with interest at the rate of eight per cent per annum, said note, so it is alleged, having been made and delivered by the defendant to E. M. Stevens & Son, a copartnership; 2. Upon an account stated on the fifth day of October, 1908, by and between said copartnership, E. M. Stevens & Son, and the defendant Selma Fruit Company, Inc., "for a balance due for moneys received by said defendant for said E. M. Stevens & Son, on account of raisins sold by and through said defendant, less charges for brokerage, discount and packing charges, upon the statement of which said account it appeared that the said defendant was indebted to the said E. M. Stevens & Son in the sum of \$2,902.55." The transactions culminating in the execution and delivery of the promissory note and the rendering of the stated account are alleged to have taken place at the same time, and that both the note and the stated account involve the same indebtedness.

It appears from the complaint that, antecedently to the institution of this action, R. E. Stevens, one of the copartners, assigned to plaintiff, E. M. Stevens, all his right and interest in and to said promissory note and the stated account, and

that the plaintiff is the owner and holder of both said note and said account.

Judgment is asked for in the sum of \$2,902.55 and interest on said sum from the date of the execution and delivery of said note.

The answer first denies generally the averments of the complaint as to the first cause of action and then sets up the plea that the promissory note therein declared upon was "executed and delivered without any consideration."

The allegations of the second count of the complaint are denied, and, additionally, and by way of a special defense, it is charged that the alleged account and the promise to pay the same were stated and made by T. H. Elliott, the manager of the defendant, under a mistaken belief that the transactions as to which said account was stated were had and conducted between said copartnership and his defendant; whereas, so it is alleged, said transactions were had between said E. M. Stevens & Son and Selma Fruit Company, a corporation, of which more will be learned in the course of this opinion, and that defendant was not concerned or connected with said transactions.

Judgment passed for the plaintiff in the sum evidenced by the note and accrued interest.

This appeal is by the defendant from said judgment and the order denying it a new trial.

A full and accurate statement of the facts leading to this action is embodied in the brief of the respondent, and we deem it convenient to adopt said statement as a recital of the facts in this opinion:

"The Selma Fruit Company was, during all the times mentioned in the complaint, a corporation duly organized under the laws of the state of California, and from January, 1908, until the first day of August, 1908, the said Selma Fruit Company owned and operated a packing-house in the town of Selma, county of Fresno, state of California, and was engaged in the business of buying, packing and selling raisins, both upon its own account and for others. It also appears that during the winter months of 1908, and after the 1st of January, 1908, E. M. Stevens & Son delivered certain raisins to the warehouse of said Selma Fruit Company and for which weigh tags were duly issued to E. M. Stevens & Son. It

further appears from the evidence that on the ninth day of April, 1908, said Selma Fruit Company took up the weigh tags for said raisins and issued to said E. M. Stevens & Son a warehouse receipt for the raisins so delivered to said company, being the same raisins represented by the weigh tags theretofore delivered to E. M. Stevens & Son and at that time taken up by said company.

"The said Selma Fruit Company was instructed by said E. M. Stevens & Son to receive offers for said raisins and submit any offers received by said company for said raisins to said E. M. Stevens & Son. About July 8, 1908, Jas. R. Baker & Company, of Chicago, offered to buy from said Selma Fruit Company raisins, which offer was submitted to said E. M. Stevens & Son and by them approved. On July 17, 1908, said Selma Fruit Company and one T. H. Elliott entered into an agreement to sell to certain parties certain patent applications of said T. H. Elliott, together with all of the property, real and personal, packing-house, business and goodwill of said Selma Fruit Company, the purchaser of said property purchasing the same for a corporation thereafter to be formed.

"The purchasers of said property constituted a committee whose business it was to procure said property and business and to form a corporation for the purpose of taking over all of said properties and business and to carry on the business of buying and selling and dealing in fruits and raisins and conducting a general packing business. On August 1, 1908, said committee entered into a contract with said Selma Fruit Company and said T. H. Elliott in pursuance of said original agreement to purchase, in which it was agreed that the business referred to should be conducted by the Selma Fruit Company under its then organization commencing August 1, 1908, for and on behalf of said corporation to be formed by said committee. 'Said Selma Fruit Company shall continue to operate said business until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account. All the contracts made by Selma Fruit Company for the delivery of dried fruit and raisins *by growers* on and *after August 1, 1908*, shall be carried out by said Selma Fruit Company, for and on behalf of said new corporation.'

"Said Selma Fruit Company conducted the business in which it had theretofore been engaged from and after August 1, 1908, for and on behalf of the new corporation to be organized, and a new corporation was organized in pursuance of the agreements of said committee and by formal resolution passed by the unanimous vote of the stockholders at the meeting of stockholders of said new corporation, the Selma Fruit Company, Inc., on September 5, 1908, all of the work of said organizing committee was ratified and approved, said committee having made a full report to said stockholders' meeting, and all said properties and business of said Selma Fruit Company together with all said patent applications of said T. H. Elliott, including all trademarks and brands belonging to said business had been formally taken over by the board of directors of said Selma Fruit Company, Inc., at a meeting thereof held August 17, 1908. By act of the board of directors of the Selma Fruit Company, Inc., and by unanimous vote of the stockholders of said Selma Fruit Company, Inc., all of the work of said committee of organization was duly ratified and all of the business of the Selma Fruit Company was taken over as of August 1, 1908, from which time it was operated by the Selma Fruit Company for and on behalf of the Selma Fruit Company, Inc., being under the advice and control of said committee, until the time of the formal resolution of the new company taking over the business, after which the business was operated and controlled by the new corporation, Selma Fruit Company, Inc., for and on its own behalf.

"The raisins delivered by said E. M. Stevens & Son were held from and after August 1, 1908, until about the middle of September, 1908, at which time they were shipped to Jas. R. Baker & Co. with other raisins with which they had been mingled after being stemmed and seeded, and the Selma Fruit Company, Inc., received the money paid for all said raisins of E. M. Stevens & Son, for which said Selma Fruit Company, Inc., by its secretary and manager, rendered a stated account and executed and delivered to E. M. Stevens & Son a promissory note of said Selma Fruit Company, Inc., for the balance found due on said stated account."

The court found, among other things, that the defendant is a corporation engaged in the business of selling, packing, shipping and dealing in dried fruits and raisins, in the town

of Selma, Fresno county; that during the months of August and September, 1908, said E. M. Stevens & Son owned and had stored in the warehouse of the defendant certain raisins, and that, in the month of September, 1908, the "defendant sold, shipped and delivered said raisins and received the purchase price and all the proceeds of said sale of said raisins, and appropriated all the said money to its own use and that said sale and delivery of said raisins and the receipt of the proceeds thereof were by and with the consent of said E. M. Stevens & Son"; that, on the fifth day of October, 1908, the defendant and said E. M. Stevens & Son had an accounting between themselves, "and account was duly stated between defendant and said E. M. Stevens & Son, and it was found by said account stated that defendant owed said E. M. Stevens & Son the sum of \$2,902.55, and defendant then and there agreed to pay to said E. M. Stevens & Son said sum of \$2,902.55 so found due to said E. M. Stevens & Son from defendant, and said E. M. Stevens & Son then and there agreed with defendant that said sum of \$2,902.55 was the balance due said E. M. Stevens & Son from defendant, and defendant agreed to pay said sum of \$2,902.55 to said E. M. Stevens & Son, with interest thereon, at the rate of eight per cent per annum until paid"; that "said T. H. Elliott, as the manager of defendant, acted for and on behalf of defendant in stating said account between said defendant and said E. M. Stevens & Son, and said T. H. Elliott and defendant had full knowledge of the account between defendant and said E. M. Stevens & Son, and said account was not stated by mistake of said T. H. Elliott, or any other person, or of defendant, but said account was stated with full knowledge of all the facts at the hand and in the possession of defendant and its said manager and fully known to defendant and said manager"; that the net proceeds from the sale of said raisins of E. M. Stevens & Son constituted the consideration of the promissory note set out in the complaint, and that "said note was duly executed by defendant under its corporate seal."

The findings above referred to, based principally upon the testimony of T. H. Elliott, are challenged upon the ground that the evidence does not sustain them, and the conclusion of law therefrom and the judgment are attacked upon every con-

ceivable ground upon which anything like a plausible assault could well be predicated.

The crux of the whole controversy, as it is argued and submitted here, is immured within the proposition whether T. H. Elliott, the manager of the defendant, was, as such manager, clothed with authority to make the stated account and execute the note counted upon in the complaint for and on behalf of the defendant.

After the creation and organization of the new corporation (the defendant), T. H. Elliott was duly appointed as the manager thereof. By resolution or motion duly entered in the minutes of the meetings of the board of directors, the latter vested in the manager the authority "to employ and discharge the necessary labor in and about the packing-house of the corporation, to conduct the packing operations, to purchase the necessary supplies and to buy and sell the goods and products in which the corporation intends to deal, and *generally to conduct the affairs of the corporation, subject to the direction of the president, and this board.*"

It was further ordered by the board of directors that "all contracts for the purchase or sale of dried fruit or raisins, or other products or merchandise to be dealt in by the corporation, or for packing material or supplies, be approved by both the president and the manager." The following is also a part of the order or resolution of the board, entered upon its minutes, relative to the powers of the manager and president: "The president of this corporation is hereby requested and instructed to visit the packing-house, at some time during every working day, during the active operations of the house, and to carefully oversee such operations in a general way, to require all contracts of purchase or sale as per previous resolution to be submitted to him for his approval, and generally to consult with and direct the manager in the conduct of the business of the corporation, it being understood that the immediate direction of said operations is in the hands of the manager and orders and directions regarding same shall be issued by him except in the event of flagrant abuse or neglect of such authority by said manager, *and that the authority of the president shall be exercised over and through the manager so long as said manager shall properly conduct said business and operations.*"

There is in the record before us no evidence from which it appears that any particular officer of the defendant was specifically authorized by the board of directors to execute promissory notes for and on its behalf. The very nature of commercial corporations, of which the defendant is a type, requires that the authority to transact their usual or ordinary business affairs shall be vested in some one or more persons. A corporation is an artificial person, and where it is organized for commercial purposes its president or general manager or whoever may be given immediate direction or control of its affairs is its agent, empowered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to do some particular act, which is included within the ordinary affairs of such a corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation to perform such particular act will be inferred from the general authority so given. And where, as was clearly the case here, an officer of a corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. (*McKiernan v. Lenzen*, 56 Cal. 61; *Phillips v. Campbell*, 43 N. Y. 271; *Seeley v. San Jose Independent Mill & Lumber Co.*, 59 Cal. 22, 24; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 332, [4 Pac. 106]; *Jennings v. Bank of California*, 79 Cal. 323, 328, [12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852]; *Greig v. Riordan*, 99 Cal. 316, 323, [33 Pac. 913]; *Bates v. Coronado Beach Co.*, 109 Cal. 160, 162, [41 Pac. 855]; *Wells, Fargo & Co. v. Enright*, 127 Cal. 669, 672, [49 L. R. A. 647, 60 Pac. 439]; *Siebs v. Hendy Machine Works*, 86 Cal. 390, 392, [25 Pac. 14].)

In the case at bar, Elliott, the secretary and manager, testified that he had, as such officer of the defendant, executed, under the seal of the corporation, and as the acts of the cor-

poration, other promissory notes, and his authority to do so never was questioned by the board of directors or president. Of these acts by the manager, the board of directors must be presumed to have had knowledge. In *Martin v. Webb*, 110 U. S. 7, [28 L. Ed. 49, 3 Sup. Ct. Rep. 428], the United States supreme court, speaking through Mr. Justice Harlan, said: "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." (See, also, *Carpy v. Dowdell et al.*, 113 Cal. 677, [47 Pac. 695].) It is further said in the *Martin v. Webb* case that the authority of a particular officer of a corporation to do a particular act for and in the name of such corporation, where the authority to do such act is not expressly conferred, may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of such corporation. In other words, his authority may be by parol, and collected from circumstances.

In *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, [4 Pac. 106], it is said: "While the authority of all officers or agents of a corporation must be limited to such modes of binding the corporation as result from the nature of the duties and the powers conferred upon them, yet when the corporation itself holds out to the public that its officers or agents have authority to act according to the general usage, practice, and course of its business, the acts of such agents within the scope of such usage, practice and course of business will be binding upon the corporation in favor of third persons possessing no knowledge to the contrary."

No one can read the evidence in this record and reasonably arrive at any other conclusion than that the defendant held out to the public that its manager, Elliott, had full power to do all things embraced within the ordinary and usual course of its business, including the very common practice, when necessary, of executing promissory notes.

But we think that a fair, just and reasonable construction of the above-noted order or resolution of the board of directors defining the powers of the secretary and manager must include

therein the authority to execute promissory notes for the corporation where the exigencies of its business require such transactions. Counsel for appellant argue, however, that the general language of the first part of said order which reads, "and generally to conduct the affairs of the corporation, subject to direction of the president and this board," necessarily implies a limitation of the power of the manager to the exercise of the specific authority previously given—that is to say, that, he having been clothed with power to do certain specified acts with relation to the affairs of the corporation, the general language referred to means that he is to have *general power* only to do the acts specifically designated. But, even if it be granted that counsel are correct in their contention that the general power thus given is to be confined in its exercise to those matters as to which specific authority is conferred, or in other words, does not have the effect of enlarging the authority of the manager or extending it beyond that with which he is specifically vested, still, in our opinion, the language of the order specifying the powers of the manager is broad enough to include the authority to execute, when the exigencies of the corporation's business require it, promissory notes for the corporation and thus and thereby to bind it. The order provides, it will be noted, that the manager may "*buy and sell* the goods and products in which the corporation intends to deal," and it will not be disputed that, in the absence of an express negating of such authority, the power in the manager to buy goods in which the corporation deals for the corporation implies and carries with it the power to pay for the goods from the latter's funds, or includes the authority to buy on credit, and to do such a usual thing as to give the note of the corporation as evidence of its obligation to pay. (*Siebe v. Hendy Machine Works*, 86 Cal. 390, [25 Pac. 14], and cases therein cited.) But throughout the entire order or resolution of the board of directors purporting to outline the duties and define the authority of the manager it is plainly manifest that the intention was to vest that officer with full power to transact the ordinary business of the corporation and to that end to do all things and perform all acts necessary to the execution of the general commercial purposes of the defendant. It will be observed that the authority of the president is supervisory only over the manager. All contracts of purchase or sale

must be, it is true, submitted by the manager to the president for the latter's approval, but it is expressly provided that the *immediate* direction of the operation of the business shall be vested in the manager. The latter is clothed with all the authority of the president, "so long as said manager shall properly conduct said business and operations." By this provision it is clear that it was intended to give full authority to the manager to perform all such acts as were required to be performed in the ordinary or usual course of the corporation's business. The president no doubt possesses authority superior to that of the manager. As to all corporations, the board of directors possess the ultimate power over their affairs, but it is true as to all corporations, as it is here, that, where to a particular officer or person is committed the immediate direction of their affairs, his act, within the scope of his authority, and arising in the transaction of the ordinary and usual business of the corporation, will be binding upon the corporation, unless such act has been expressly inhibited to him under such circumstances as that the public or those having business with the corporation ought to know of the inhibition. But even if it be conceded that the rendering of the stated account and the making of the note for the corporation involved an act in excess of the sphere of Elliott's authority as manager, it is nevertheless true that the fact stands undisputed in the record that the president, whose authority to execute promissory notes for the corporation is not and cannot be questioned, authorized Elliott to pay the note, as a liability of the corporation, upon its maturity, thereby ratifying the act of the manager in executing the note and thus fully recognizing the propriety of that act as one among those within the authority of the manager to perform.

But it is contended that the note is unsupported by a consideration. It was, of course, incumbent upon the defendant to show a want of consideration, the presumption being that a promissory note was given for a sufficient consideration. (Code Civ. Proc., sec. 1963, subd. 21; Civ. Code, secs. 1614, 1615; *Schallard v. Eel River Nav. Co.*, 70 Cal. 144, 146, [11 Pac. 590]; *Vaca Valley etc. R. R. Co. v. Mansfield*, 84 Cal. 560, 565, [24 Pac. 145]; *Underhill v. Santa Barbara Co.*, 93 Cal. 300, 314, [28 Pac. 1049]; *Burnett v. Lyford*, 93 Cal. 114, 117, [28 Pac. 855]; *Mills v. Boyle Mining Co.*, 132 Cal. 95, 97,

[64 Pac. 122] ; *Keating v. Morrissey*, 6 Cal. App. 163, [91 Pac. 677].)

As we have seen, the defendant not only challenges the authority of Elliott, as manager, to make the note in question, but denies his right as such manager to render the stated account upon which the note was executed and delivered to Stevens & Son, and, moreover, denies that the liability upon the transaction as to which the account was stated and the note given existed against the defendant. The claim is, in other words, that the obligation or debt for which the note was given was not the obligation or debt of the defendant but that of Selma Fruit Company—the old corporation. The purpose of the proof addressed to this point was to show, of course, that the note was given without a consideration.

But we think that the evidence very plainly discloses that the defendant, by agreement, not only absorbed the old corporation, Selma Fruit Company, including all its property, but assumed the fulfillment of all its uncompleted contracts and the satisfaction of all its outstanding obligations, including the transaction upon which this action is founded.

The facts as to the formation of the new corporation and the arrangement with the old company have already been told in a general way, and are undisputed. The question upon which the parties differ is as to the intention or scope and effect of the understanding and arrangement of said parties in the premises as evidenced by the written agreement between the committee, appointed from the subscribers to the capital stock of the proposed new corporation to prepare for the formation of the latter, and the old corporation.

This agreement is not in obscure or doubtful language, and clearly exhibits, we think, the extent to which it was intended that the new corporation was to be bound in the matter of the burdens and contracts of the corporation to whose business and properties it succeeded.

After explaining that Selma Fruit Company and T. H. Elliott agreed to "sell to certain parties four certain patent applications of T. H. Elliott, and lots, packing-houses, machinery, etc., and the goodwill of Selma Fruit Company," all packing material and supplies on hand and all contracts for supplies in connection with *said business*, and contracts for the purchase of about one hundred tons of raisins, etc., and

that said company was instructed to make arrangements "to immediately take over *the business* of the Selma Fruit Company," etc., said agreement provides *inter alia*: ". . . That the *business of said Selma Fruit Company, etc., . . . shall be continued by said Selma Fruit Company, under its present organization, commencing Aug. 1st, 1908, for and on behalf of said corporation so to be formed by said committee. Said Selma Fruit Company shall continue to operate said business until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account.*"

It appears to us that nothing could be clearer than that, by the foregoing language of said agreement, it was intended and understood that the proposed new corporation, the specific and avowed purpose of which was to succeed to the *business* of the old company, should not only take over all the properties of the old corporation but assume all its obligations and contracts. The fact that the old corporation was authorized and empowered to proceed with the transaction of the business in which it was and had been engaged *for and on behalf of the proposed new corporation* and to so continue "*until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account,*" leaves open no other construction of the scope of the agreement. And, as if to emphasize the intention as thus gathered, the agreement proceeds: "*All business contracted on and after August 1st, 1908 (the date of the agreement), shall be subject to the consideration and approval of the parties of the second part.*" In other words, all business for which contracts had been made by the old company prior to the execution of the agreement is not subject to the consideration and approval of the committee (parties of the second part), since such contracts have already been considered, approved and accepted and the company has bound itself to carry them out; while that business for which contracts may be made subsequently to the making of the agreement must first be approved by said committee, since after that date the operation of the business of Selma Fruit Company by the latter is not for and on account of said company, but for and on account of its proposed successor, the defendant herein.

In short, the transaction from which this action arises was pending and existed as and involved one of the obligations of the old company at the time of the execution of the agreement referred to. The old company was in that transaction acting as a broker for the copartnership. The raisins were in the possession of the old company at the time of the making of said agreement, and an offer to purchase the raisins had been made and accepted. Now, even if it may be said that it is not clear from the language of the agreement itself that the defendant intended to assume, and did in fact assume, the relation to Stevens & Son, as to the raisins involved in the transaction, which was sustained to the copartnership by the predecessor of the defendant, we think that such relation is nevertheless clearly and conclusively established by the fact that the defendant, *after* it was formed and organized and took over all the properties and the business of the old company, shipped the raisins of Stevens & Son to the Chicago buyer and received the money from said buyer in payment thereof.

Moreover, no question was raised by the defendant of the relation it sustained to the copartnership at the time the account between it and Stevens & Son was stated and its note given as evidence of the amount ascertained to be due on said account. The president knew of the circumstance of the rendering of the account by Elliott in his capacity as manager, knew that, in lieu of turning over the money received for the raisins to Stevens & Son, Elliott made and delivered to them the note of the defendant for the amount so received, and indeed, as seen, subsequently recognized and ratified the manager's action in the matter as the action of the defendant by ordering the note to be paid.

No ground, it seems to us, exists for doubting that the findings are amply supported, and much less can it be doubted that the judgment is absolutely just. Indeed, the complaint, so far as the cause of action on the promissory note is concerned, could and should be sustained solely upon the theory that the defendant borrowed from Stevens & Son the money for which the note in question was given, and without regard to the question whether the money so borrowed constituted the proceeds of a sale of the raisins or whether said raisins were sold either by Selma Fruit Company or by the defendant.

It cannot be doubted that Elliott, either as an individual or as the agent of the defendant, received the sum of money specified in the note for Stevens & Son on account of the sale of the latter's raisins. He declared that the money was forwarded by the purchaser of the raisins to the defendant and that the latter received said money for Stevens & Son. But, however that may be, there is one very important and vital fact which appears to be unquestionably established by his testimony (and upon this point he is not contradicted), and that is that when Stevens & Son demanded a settlement and the sum of money due the copartnership was determined, he (Elliott), acting in his capacity as manager of the defendant, asked them to take the corporation's note for the amount for the term of one hundred days, saying that the defendant needed the use of the money. Stevens & Son consented to the proposition and accepted the note. It is not disputed that the corporation needed the money and used it for its purposes. To the contrary, the only evidence in the record addressed to that point discloses that the corporation did need the money and used it in the course of its business operations. Now, conceding that the defendant did not act for Stevens & Son in the handling and sale of their raisins and that it did not receive the money from Stevens & Son from the purchaser of the raisins, but that Selma Fruit Company conducted the transaction, and that Elliott, as an individual, received the money after the absorption of the old company by the defendant, and yet no one will have the temerity to gainsay the very obvious proposition that, having borrowed the money and executed its promissory note as evidence of the liability or obligation, the defendant must be held for the extinguishment of such obligation. In such case, the question whether the defendant acted as broker for Stevens & Son in the sale of the raisins would, manifestly, be immaterial.

The contention that plaintiff is not owner of the account and note is without merit. Both plaintiff and his son, R. E. Stevens, testified that they constituted the copartnership of E. M. Stevens & Son, and that R. E. Stevens, prior to the commencement of this action, assigned and transferred to his father, the plaintiff, all his interest in the account and note in question. It is argued, however, that, in order to vest the sole ownership of account and note in the plaintiff, it was neces-

sary that the assignment should have been made by the copartnership. We know of no rule or reason against the right of one partner to assign his interest in the copartnership or in the property or contracts of the copartnership to another partner.

We have not attempted to notice all the points, of which there is a great variety, urged by the appellant against the decision of this controversy. Nor have we followed, or deemed it necessary to follow, the ramifications of the ingenious arguments offered in support of those points. We conceive it to be enough to say that neither the points nor the arguments, the latter monuments to the genius and zeal of counsel, have appealed to us as possessing sufficient force to molest in the slightest measure a judgment that plainly appears to our minds to be not only just but in all respects legally impregnable.

The judgment and order are, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 904. Third Appellate District.—February 15, 1912.]

In the Matter of the Estate of SIDNEY NEWELL, Deceased. THE ANGLO & LONDON PARIS NATIONAL BANK, a Corporation, and STOCKTON SAVINGS BANK, a Corporation, Respondents, v. SIDNEY W. NEWELL, as Executor of the Last Will and Testament of SIDNEY NEWELL, Deceased, Appellant.

ESTATES OF DECEASED PERSONS—REMOVAL OF EXECUTOR FOR FRAUD UPON ESTATE—FALSE CLAIM ALLOWED FOR PRIVATE DEBT.—An executor should be removed under the terms of section 1136 of the Code of Civil Procedure, "when he has committed or is about to commit a fraud upon the estate." The act of the executor in allowing a false claim against the estate, with full knowledge of how the claim had originated, and that he had himself created the same as a claim against the estate, for the purpose of reimbursing his sister in law for moneys which he himself had borrowed from her, constituted a fraud against the estate for which he was properly removed.

Id.—FRAUDULENT USE OF POWER OF ATTORNEY—EXECUTION BY EXECUTOR TO HIMSELF—TRANSFER TO PRIVATE DEBTOR—APPROVAL OF CLAIM.—Where the executor fraudulently used a power of attorney given to him by decedent while he was lying ill and near death, which contains no power to execute a note, to execute his note to himself, and then transferred the same to his sister in law, so as to include a large amount of interest added to his debt to her, and then approved the same as a claim against the estate, the case is clearly one of fraud upon the estate.

Id.—REVIEW UPON APPEAL—DISCRETION OF COURT IN REMOVING EXECUTOR.—The superior court, as a court of probate, has the supervision of the estates of deceased persons, and is vested with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate; and that power is not to be interfered with by the appellate court, if it does not appear that its discretion has been abused; and where its findings and the evidence supporting the same appear to justify its action, this court will not review the same upon appeal.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

Harding & Monroe, for Appellant.

Lilienthal, McKinstry & Raymond, and Arthur L. Levinsky, for Respondents.

BURNETT, J.—The appeal is from an order and judgment of removal of the executor. Several charges of misconduct were specified in the petition. The one which the court made the basis for its order is embraced in the following findings:

“That prior to the year 1895, Sidney W. Newell was a member of the firm of Eaton, Newell & Buckley, and prior to the year 1895, the above-named firm borrowed from Miss A. M. Upstone, who at said time was, and ever since has been, and now is, a sister in law of Sidney W. Newell, the sum of \$3,000, and upon the dissolution of the above-named firm, in the year 1894 or 1895, it was agreed that said Sidney W. Newell should pay the said Miss A. M. Upstone the aforesaid sum of \$3,000.

“That said Sidney W. Newell, and his father, Sidney Newell, executed a note in favor of said Miss A. M. Upstone for said sum of \$3,000, together with interest from date of

said note, and said note remained in the possession of Sidney W. Newell, who at said time was attending to and from said time continued to attend to and manage all the business of Miss A. M. Upstone, and he continued to attend to all the business of Miss A. M. Upstone since said time and up to the present.

"That said note was never paid, and the same became outlawed, and the said Miss A. M. Upstone never demanded payment of said note from Sidney Newell (now deceased), or from the said Sidney W. Newell, and the said Sidney W. Newell destroyed said note.

"That in the year 1886, Sidney Newell (now deceased) executed and delivered to Sidney W. Newell a certain power of attorney, which power of attorney is general in its form and substance. . . .

"That said power of attorney nowhere and in no place authorizes the indorsement of a promissory note.

"That said power of attorney remained in one of the boxes in the vault of Stockton Savings Bank, and it was never recorded.

"That on the thirty-first day of August, 1909, and for some time prior thereto, Sidney Newell, now deceased, was sick and ill, and he died on the twenty-fifth day of November, 1909.

"That on the thirty-first day of August, 1909, at and in the city and county of San Francisco, Sidney W. Newell made and executed his certain promissory note in writing, in favor of his father, Sidney Newell, for the sum and amount of \$7,561. . . . And thereupon, the said Sidney W. Newell indorsed said note as follows: 'Pay to the order of Miss A. M. Upstone; Sidney Newell by S. W. Newell, his attorney in fact, for value received. Demand and notice of nonpayment are hereby waived this 31st day of August, 1909. Sidney Newell by S. W. Newell, his attorney in fact.'

"And on the same day the said Sidney W. Newell forwarded the said note to Miss A. M. Upstone, who at said time was temporarily in the county of Butte.

"That at the time of the execution of the aforesaid note, by the said Sidney W. Newell, in favor of his father, Sidney Newell, the said Sidney W. Newell was not indebted to his father, Sidney Newell, in any sum of money whatsoever.

"That the said Sidney W. Newell never informed his father that he had executed the aforesaid note in his favor, nor did he inform his father that he had indorsed said note to the said Miss A. M. Upstone, and he did not advise his father, Sidney Newell, of anything whatsoever, or at all, regarding the aforesaid note.

"That the said Miss A. M. Upstone had never demanded of the said Sidney W. Newell the execution of the aforesaid note, but he did the same voluntarily and without demand, and he arrived at the amount of said note by calculating the amount of interest on said outlawed note of \$3,000 from the time the note was originally given in the year 1894 or 1895, and added to the principal sum of said note of \$3,000 the sum of \$4,561 as interest.

"That thereafter, the said Miss A. M. Upstone returned from Butte county in the state of California, and went to reside with, and ever since has resided with, the said Sidney W. Newell, at his home in Alameda county.

"That the said Sidney W. Newell never at any time prior to the execution by him of the aforesaid note in favor of his father, and his indorsement thereon by him as attorney in fact to the said Miss A. M. Upstone, and at no time thereafter, ever used the aforesaid power of attorney at all, or exercised any rights thereunder.

"That on the thirty-first day of August, 1909, the said Sidney Newell was sick and ill and was expected to die at any time, and the fact that he was liable to die at any time was at the said time known to his son, Sidney W. Newell.

"That Sidney Newell was not indebted to Miss A. M. Upstone and the said Sidney W. Newell, by executing his note to his father, Sidney Newell, when he was not indebted to his father, and then indorsing said note in his capacity as attorney in fact for his father, in favor of Miss A. M. Upstone, sought to charge the estate of his father, to wit, the estate of Sidney Newell, deceased, with the payment of said note, not for the payment of a debt owed by Sidney Newell, but for a debt owed only by Sidney W. Newell.

"That on the twenty-ninth day of November, 1910, Miss A. M. Upstone, using the aforesaid note as a basis therefor, presented a claim against the estate of Sidney Newell, deceased, for the sum of \$8,218.17, . . . and the said Sidney W.

Newell, as the executor of the last will and testament of Sidney Newell, deceased, did, on the twenty-ninth day of November, 1910, allow the said claim of the said Miss A. M. Upstone for the full amount of \$8,218.17, and the said claim was upon the same day presented to the judge of this court for allowance, and the judge of this court disallowed and rejected the said claim." That the transaction in reference to the said note was without the knowledge of the deceased, and that the amount of the said claim is greater than the value of the said estate.

The court concluded that the allowance of this claim, under the foregoing circumstances, by the executor was a fraud upon the estate and the order of removal followed. There is no doubt that the evidence supports the said findings, and the only question can be whether they warranted the judgment of the court in removing the executor. Among the grounds for such removal enumerated by the statute is "fraud," as provided in section 1436 of the Code of Civil Procedure, that "An executor should be removed when he has committed, or is about to commit, a fraud upon the estate." Of course, the rule for our guidance in reviewing the action of the court below is as stated in *Estate of Healy*, 137 Cal. 474, [70 Pac. 455]: "The court by which an executor or administrator is appointed has a very large discretion in determining whether, upon the facts presented to it, the officer shall either be suspended or removed, and, unless it shall appear that such discretion has been abused, and especially where the evidence is such that different minds might reach different conclusions thereon, the action of the trial court will not be reviewed on appeal."

It is undoubtedly true, also, as stated in *Estate of Bell*, 135 Cal. 196, [67 Pac. 123], that "a probate court should not defeat the will of the testator by removing his chosen executor for light or trivial causes"; also, as declared further in said opinion: "But on the other hand, to the probate court is given, in the first instance, the supervision and protection of estates of deceased persons, with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate; and that power is not to be interfered with by the appellate court, unless there has been a clear abuse of that discretion."

The findings that we have quoted and the evidence supporting them present an unusual situation involving such circumstances of suspicion and discredit as to render it impossible for us to say that the court below abused its discretion. The learned judge of the lower court in his opinion declared: "That the act of the executor in allowing the claim hereinbefore referred to, possessing at the same time full knowledge of how the claim had been created, and that he himself had created the claim for the purpose of reimbursing his sister in law for moneys which he himself had borrowed, constituted a fraud against the estate seems to the court unquestionable. The fact that the judge of this court, to whom said claim was presented for approval, did not approve the same does not in any manner lessen the character of the act of the executor. It is the duty of an executor not only to protect the estate from fraudulent claims but also, if he has knowledge of the questionable character of any claim, to advise the court thereof. An executor is an officer of the court, and the judge whose duty it is to approve claims must to a greater or less extent depend upon the executor of an estate for information as to the merits of the claims presented."

We have given attention to the argument of appellant, but, in view of what has been stated, supplemented by the consideration due the situation of the trial judge as to the manner and appearance of the witnesses and the personal element involved, which cannot be reproduced by the record, we think further comment is unnecessary, and that we would be entirely unwarranted in interfering with the order or judgment.

It is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 908. First Appellate District.—February 16, 1912.]

MILLIE FITZPATRICK, Appellant, v. THE NORTH AMERICAN ACCIDENT INSURANCE COMPANY, a Corporation, Respondent.

ACCIDENT INSURANCE—LIMITATION IN POLICY AS TO TIME OF BEGINNING ACTION—INSUFFICIENT COMPLAINT—JUDGMENT ON DEMURRER—APPEAL.—In an action by a wife upon a policy of accident insurance in favor of her husband, who died as the result of accidental injuries sustained by him, in which it appears that the policy limited the time for the commencement of the action to a period of twelve months from the date of the accident, and that the action was commenced nearly thirteen months after that date, the ruling of the trial court in rendering judgment for defendant upon demurrer to the complaint, on the ground that the action was barred, must be upheld upon appeal.

ID.—GENERAL RULE AS TO LIMITATION OF ACTIONS IN INSURANCE POLICIES. It is a settled rule that clauses in policies of insurance, limiting the time in which actions may be commenced thereon to a time shorter than that prescribed by the statute of limitations, are valid if the time limited is not in itself unreasonable.

ID.—RULE AS TO ESTOPPEL IN CASE OF BAD FAITH.—If the company defendant had been guilty of bad faith, or such conduct as rendered it impossible to comply with the provisions of the policy, before the time limited for bringing the suit had expired, it would be estopped from relying thereon.

ID.—ABSENCE OF ESTOPPEL—EXACTION OF PROOFS OF LOSS—TIME FOR ACTION.—There is no element of estoppel of the accident insurance company, defendant, available to the plaintiff by its merely exacting a strict compliance with the proofs of death, which were made within the time limited in the policy therefor, when there still remained ample time within which the plaintiff could bring his action.

APPEAL from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

George Ingraham, for Appellant.

J. Rollin Fitch, for Respondent.

KERRIGAN, J.—This is an action upon a policy of accident insurance issued by the defendant on May 13, 1908, in favor of Roger Fitzpatrick, the husband of plaintiff. On January 23, 1909, the insured died as the result of injuries received on the eighteenth day of January, 1909. The defendant refused payment, and the plaintiff commenced her suit to recover on the policy on February 16, 1910, nearly thirteen months from the date of the receipt of the injury resulting in the death of the insured.

The policy (which is attached to the complaint and made a part thereof) provides that the defendant shall be notified in writing, within ten days, of any injury to the insured covered by the policy; that proof of claim must be made within two months after the death or end of the disability, and that suit thereon must be brought within twelve months from the date of the accident.

To the complaint setting forth the facts of the case defendant interposed a general demurrer, which was sustained on the ground that the cause of action was barred by reason of the suit not having been commenced within the time prescribed in the policy, namely, within twelve months from the date of the accident. This appeal is prosecuted from the judgment entered upon the sustaining of the demurrer.

The action of the trial court must be upheld. It is a settled rule that clauses in policies of insurance, limiting the time in which actions may be commenced thereon to a time shorter than that prescribed by the statute of limitations, are valid. (4 Joyce on Insurance, sec. 3181; *Tebbets v. Fidelity & Casualty Co.*, 155 Cal. 137, [99 Pac. 501].) The provision in this policy, limiting the time within which suit might be brought, is free from ambiguity; and it must be held that, the action having been commenced nearly thirteen months after the occurrence of the accident, was under the express terms of the policy too late.

The authorities supporting this view are numerous. The latest judicial expression on the subject in this state is to be found in the case of *Tebbets v. Fidelity & Casualty Co.*, 155 Cal. 137, [99 Pac. 501]. There the policy provided that proof of death of the insured must be furnished the company within two months after its occurrence, and that legal proceedings for recovery under the policy might not be brought before the

expiration of three months from the date of filing proofs at the company's office, nor brought at all unless begun within six months from the time of death. There the supreme court held (Mr. Justice Henshaw writing the opinion) that the demurrer interposed to the complaint was properly sustained, observing: "The general rule, supported by the great weight of authority, is that a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid, if the time limited be in itself not unreasonable." Later on, in the opinion the court further said: "The six months' period was not itself unreasonable. It began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought before the expiration of three months from the date of filing proofs." In addition to the authorities there cited, see *Garido v. American Central Ins. Co. of St. Louis* (Cal.), 8 Pac. 512, [8 West Coast Rep. 180]; *Kettenring v. N. W. Masonic Aid Assn.*, 96 Fed. 177; *Provident Fund v. Howell*, 110 Ala. 508, [18 South. 311]; *Paul v. Fidelity & Casualty Co.*, 186 Mass. 413, [104 Am. St. Rep. 594, 71 N. E. 801]; *Travelers' Ins. Co. v. Cal. Ins. Co.*, 1 N. D. 151, [8 L. R. A. 769, 45 N. W. 703].

If the company had been guilty of bad faith, or such conduct as rendered it impossible to comply with the provisions of the policy before the time limited for bringing suit had expired, it would be estopped from relying thereon. (4 Joyce on Insurance, sec. 3220.) But merely exacting a strict compliance by plaintiff with the requirements of the policy as to when proof of death should be made is no ground for charging the insurer with causing delay when, as in this case, the necessary proofs were made within the time limited therefor in the policy, and there yet remained ample time in which the insured could bring his action. There is therefore no element of estoppel available to the appellant.

Case v. Sun Ins. Co., 83 Cal. 473, [8 L. R. A. 48, 23 Pac. 534], cited by appellant, is not in conflict with this view. There the policy provided that any action thereunder must be brought within twelve months next after the occurrence of a fire, and no adjusted claim was payable until sixty days after full completion by the assured of all requirements contained in the policy. In that case it was alleged and proved

that a strict compliance with all the requirements of the policy was exacted by the company, and that the assured complying therewith as rapidly as he could was unable to do so fully until nearly fourteen months after the fire. This certainly was, in the language of *Hart v. Citizens' Ins. Co.*, 86 Wis. 77, [39 Am. St. Rep. 877, 21 L. R. A. 743, 56 N. W. 332], "a clear case of estoppel. The company by its own act had postponed the time when a cause of action accrued until after the limitation had run, and should be clearly denied the right to rely upon the limitation."

The plaintiff in the case at bar had ample time after the right accrued within which to bring the action on the policy, and no equitable circumstance is pleaded to take the case out of the operation of the limitation clause.

The judgment is affirmed.

Hall, J., and Lennon, P. J., concurred.

[Civ. No. 928. First Appellate District.—February 20, 1912.]

GERMAN SAVINGS AND LOAN SOCIETY, Appellant, v.
JOSEPH E. BIEN et al., Defendants; DORA PEYSER,
Respondent.

JUDGMENT—MOTION TO VACATE FOR WANT OF SERVICE OF SUMMONS—AFFIDAVIT OF MERITS NOT REQUIRED.—Where a motion to vacate a judgment by default is promptly made upon the ground that the defendant has never been served with summons, and that the court did not obtain jurisdiction over the defendant, no affidavit of merits is required; and an objection upon appeal from an order granting the motion that an affidavit of merits served and filed with the motion was insufficient cannot be considered.

ID.—BENEFIT OF CODE SECTION NOT INVOKED—MERITORIOUS DEFENSE NOT REQUIRED—ABSOLUTE RIGHT TO VACATE VOID JUDGMENT.—In such case the moving party is not invoking the benefit of section 473 of the Code of Civil Procedure, but is asking for the absolute right to have a judgment in fact void vacated and set aside and is not required to show that he has a meritorious defense to the action as a condition to the granting of such right.

ID.—CONFLICTING EVIDENCE AS TO SERVICE OF SUMMONS—STATEMENT OF COURT—IMPLIED CONTRARY FINDING.—Where the motion to

vacate the judgment was heard upon affidavits and oral testimony, which was in absolute conflict as to whether or not the moving party had been served with summons, the statement by the court at the close of the evidence as to its opinion that the defendant had been served with summons, which was not signed or filed as a finding of fact, could not conclude the court from subsequently making a finding contrary thereto, which was impliedly done when the court vacated the judgment, which could only be done upon the ground stated in the notice of motion, that the moving party had never been served with process.

ID.—IMPLIED FINDING SUPPORTED BY EVIDENCE.—The implied finding was supported by the evidence of the respondent, though in direct conflict with that of the appellant.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a motion to vacate a judgment. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Goodfellow, Eells & Orrick, for Appellant.

Henry J. Brodsky, for Respondent.

HALL, J.—Defendants were sued as indorsers of a promissory note. Upon proof of personal service of summons and copy of complaint upon defendant, Dora Peyser, her default was regularly entered on the fourteenth day of July, 1910, and on the thirtieth day of July, 1910, judgment was entered against her upon said default for the sum of \$1,975.36.

On the twenty-fourth day of August, 1910, said Dora Peyser gave notice of a motion to vacate said judgment, upon the ground that she had never been served with the summons or complaint. The court, after a hearing upon the motion, granted the same, and plaintiff has appealed to this court from such order.

Appellant claims that the affidavit of merits filed and served by defendant with her notice of motion was insufficient, and that for this reason the court erred in granting the motion.

Where as in this case the motion to vacate a judgment is promptly made upon the ground that the defendant has never been served with summons, and that the court therefore did not obtain jurisdiction over the defendant, no affidavit of

merits is required. In such case the moving party is not invoking the benefit of section 473, Code of Civil Procedure, but is asking for the absolute right to have a judgment in fact void, vacated and set aside, and is not required to show that he has a meritorious defense to the action as a condition to the granting of such right. (*Norton v. Atchison etc. R. Co.*, 97 Cal. 388, [33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452]; *Toy v. Haskell*, 128 Cal. 558, [79 Am. St. Rep. 70, 61 Pac. 89]; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, [56 Pac. 797]; *Waller v. Weston*, 125 Cal. 201, [57 Pac. 892].)

This brings us to the principal point urged for reversal, which is that upon the record it appears that respondent was in fact served with process.

The motion was heard upon affidavits and oral testimony. The evidence given pro and con upon the question as to whether respondent was served with process is in absolute conflict. The bill of exceptions, however, shows that the taking of evidence having been concluded, "The court then stated that in his opinion the defendant Peyser was served as claimed by plaintiff, but expressed doubt as to his power to impose, as a condition to setting aside the judgment, that said defendant should waive the statute of limitations as a defense."

"Counsel for plaintiff then stated that, if desired, he would submit authorities in support of the power of the court to require the defendant to waive the statute of limitations as a condition to setting aside the judgment."

The court thereupon ordered the matter to be submitted, and directed counsel for plaintiff to serve the other side with a copy of such authorities.

Subsequently, upon the twenty-fourth day of September, 1910, the court granted respondent's motion upon condition that she pay plaintiff's costs expended.

Subsequently, upon the fourth day of October, 1910, counsel for plaintiff stating in open court that plaintiff waived such costs, the court made, and caused to be entered, an order, reciting the making of the order of September 24th and the refusal of plaintiff to furnish respondent with such items of costs, and vacating and setting aside the judgment against respondent.

Unless the statement made by the court at the conclusion of the taking of evidence that he was of opinion that respondent

had been served with process, had the effect of a finding of fact, the order finally made by the court after the submission and consideration of the motion must be sustained. For the evidence in the record, as before stated, presents a case of a direct conflict as to whether or not respondent was ever served with process. The statement made by the court as to its then opinion at the conclusion of the taking of evidence cannot be treated as a finding of fact for the purpose of overcoming the finding, necessarily implied from the making of the order vacating the judgment, that respondent was never served with process.

The statement of opinion, relied on as a finding, was not signed or filed as the law requires for findings of fact. It was but the expression of a then entertained opinion, which the court had a perfect right to change upon further consideration of the matter before it. The court was not concluded by such statement from subsequently making a finding contrary thereto. (*Fisk v. Casey*, 119 Cal. 643, [51 Pac. 1077].) When the court finally made its order vacating the judgment it impliedly found that respondent had never been served with process. Such was the only ground of the motion, and the motion could not have been granted upon any other ground than such as was indicated in the notice of the motion. (*MacDonald v. California Timber Co.*, 151 Cal. 159, [90 Pac. 548].) Such implied finding finds ample support in the evidence given by respondent, though such evidence was strongly controverted by evidence given on behalf of appellant.

We think upon the record before us the order appealed from must be affirmed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 371. First Appellate District.—February 21, 1912.]

THE PEOPLE, Respondent, v. STEVEN FERRARA,
Appellant.

CRIMINAL LAW — GRAND LARCENY — PRIOR CONVICTION — ALIBI — EVIDENCE OF IDENTITY — CROSS-EXAMINATION — REDIRECT — PRIOR IDENTITY BY PHOTOGRAPH.—Where, upon a prosecution for grand larceny, the defendant had pleaded guilty to an alleged prior conviction, and relied upon an *alibi*, and sought upon cross-examination of the prosecuting witness to weaken and break his testimony as to the identity of the defendant, who had immediately disappeared after the larceny, and was arrested for the crime one year thereafter in Portland, Oregon, the court properly allowed the witness to testify on redirect examination that the next day after the discovery of his loss he complained to the police department, where he was shown photographs of former criminals, one of which he immediately recognized as that of the defendant.

ID.—GROUND OF ADMISSIBILITY OF IDENTIFICATION BY PHOTOGRAPH—CREDIBILITY OF EVIDENCE—CORROBORATING PROOF.—The proof as to the identification of the defendant's photograph was admissible not to show the identity of the accused as the guilty party, for which purpose it would be incompetent, but rather to establish the truth and credibility of his evidence that, after the defendant's arrest, he could and did identify him as the guilty party. The evidence of the officer, who made the arrest, was also admissible to corroborate the defendant's evidence as to the identification of his photograph made in such officer's presence in the police department.

ID.—REMARK OF COURT IN ADMITTING EVIDENCE AS TO PHOTOGRAPH—ABSENCE OF OBJECTION—POSSIBILITY OF INJURY WAIVED.—Where the court remarked upon admitting the testimony of the prosecuting witness as to the photograph of defendant found in the office of the police department that perhaps the picture was found at a place where it had no right to be, no objection having been taken to such remark at the time, the possibility of injury to the defendant therefrom cannot be considered.

ID.—REFERENCE IN TESTIMONY OF OFFICER AS TO PRIOR TROUBLE OF DEFENDANT—DEFENDANT NOT PREJUDICED.—A reference in the testimony of the arresting officer, who corroborated the evidence of the defendant as to the identification of defendant's photograph, to the fact that the defendant had been in trouble before, could not prejudice the defendant, he having by his plea of guilty to a prior conviction, injected that matter into the case, so that there was no violation of section 1025 of the Penal Code by the prosecution.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

Clarence Wilson, for Appellant.

U. S. Webb, Attorney General, and J. H. Riordan, Deputy Attorney General, for Respondent.

KERRIGAN, J.—The defendant was charged with the crime of grand larceny; he was tried, convicted and sentenced. This appeal is prosecuted by him from the judgment and from an order denying his motion for a new trial.

The defendant and the prosecuting witness, J. Valmini, met for the first time on the morning of August 15, 1910, in a saloon in Oakland. After taking several drinks together, in company with others, these two men left the saloon and went to a restaurant. While there defendant made conditional arrangements to obtain a room in the house where Valmini lived, and in the course of conversation with Valmini, learned from him that he had \$2,100 on deposit in a bank, and was looking for a location suitable for conducting a saloon business. Leaving the restaurant an automobile was hired, and they rode to Valmini's lodgings. There the defendant secured a room, and having done so suggested to Valmini that they go down town and draw the money out of the bank, which was done. After getting the money in currency Valmini, in company with the defendant, went back to his room, and withdrew the money from his pocket, intending to put it in his trunk. At this moment the defendant took the money out of Valmini's hand, saying he would wrap it up in a handkerchief; Valmini turned to open the trunk, and when he faced back again, the defendant handed him a package wrapped up in a handkerchief, which Valmini took and placed in his trunk, locking it. The defendant then proposed that they go to San Francisco, but at the suggestion of Valmini they spent the rest of the day in company with the landlady and her daughter automobile riding, returning between 6 and 7 o'clock in the evening. Defendant renewed his invita-

tion to Valmini to go to San Francisco, and they started together for that city, but at a point en route the defendant informed his companion that it was unnecessary for him to go any farther, and suggested that they meet the following morning. Returning home Valmini discovered the loss of his \$2,100. The matter was immediately reported to the police department, and in July of the following year the defendant was apprehended in Portland, Oregon, charged with the larceny of this money.

The defendant at the trial admitted a prior conviction, but pleaded not guilty to the present charge of grand larceny, and in support of his defense attempted to prove an *alibi*.

Valmini, the landlady and her daughter testified that the defendant was the man who was with Valmini at the times respectively referred to on August 15, 1910, when his money was stolen. On the other hand, a saloon-keeper, a bartender and a cook, all engaged in the same place of business in Portland, testified that during all the month of August, 1910, the defendant was in that place (Portland) and that they saw him daily.

Upon the redirect examination of the prosecuting witness the following took place:

"Q. Mr. Valmini, about the time you lost your money . . . did you talk with Mr. Kyle [a detective] about this case? . . . A. I think I talked to Kyle the next day. Kyle took me over to the city. . . .

"Q. Did he show you anything at that time? A. He took me over to the city and showed me all the pictures. . . .

"Q. Where?

"Mr. Wilson [defendant's counsel]: I object to that, about taking the pictures, unless the defendant was present.

"The Court: He may answer.

"Mr. Rogers: Q. Where were those pictures? A. Over in the police court over there, in the police department over in the city. I don't remember where the place was.

"Mr. Wilson: I want to enter another objection. The testimony is incompetent, irrelevant and immaterial, as basis for reversal, and I will make a motion now, in view of that testimony brought out, that this jury be dismissed and a new panel impaneled.

"The Court: If he saw the picture of the defendant anywhere, he may testify that he saw it and recognized it. If it is prejudicial, it comes from the fact that it is in a place it has no business to be, maybe; but couldn't he say in answer to your objection, that he didn't recognize this man, but that he saw and recognized a picture of him, if that is the object of it? . . .

"Mr. Rogers: Now, amongst those pictures did you see any picture that you recognized? A. I recognized the picture of Steven Ferrara."

Defendant contends that the admission of the testimony with reference to the pictures was injurious, as well as was the observation of the court that perhaps the picture was found at a place where it had no right to be.

As to the claimed misconduct of the court, no objection having been taken to the remark at the time, the possibility of injury to the defendant cannot now be considered. (*People v. Walker*, 15 Cal. App. 400, [114 Pac. 1009]; *People v. Mayes*, 113 Cal. 618, [45 Pac. 860]; *People v. Davenport*, 17 Cal. App. 557, [120 Pac. 451]; *People v. Ruef*, 14 Cal. App. 576, [114 Pac. 48, 54].)

As to the evidence just quoted, it is virtually conceded that the answer of the witness that the pictures were shown him at the police department was unexpected; and as no motion was made to strike it out, defendant cannot now at this time be heard to complain unless the testimony of the witness as to the identification of the defendant's photograph was inadmissible. (Ency. of Evidence, p. 178.)

It is important in this connection to remember that the testimony questioned was elicited upon redirect examination after counsel for the defendant had sought to break down or weaken the testimony of the witness as to the identity of the defendant. By the cross-examination of counsel for the defendant he sought to show that at all times prior to the trial the witness was doubtful as to the matter, and that it was not until he had visited the defendant five times that he was able to identify him, and that at this time the recognition was the result of remarks, intimations and suggestions of members of the police department. The purpose of the introduction of Valmini's prior identification of defendant's photograph was not to prove the identity of the accused as the guilty party—

for which purpose it is conceded it would be incompetent (*People v. Johnson*, 91 Cal. 265, [27 Pac. 663]; *People v. McNamara*, 94 Cal. 509, [29 Pac. 953]; *State v. Houghton*, 43 Or. 125, [71 Pac. 982]); but rather to establish the truth and credibility of his statement that after the defendant's arrest he could and did identify him as the guilty party. For this purpose the testimony was admissible.

In *Commonwealth v. Jenkins*, 10 Gray (Mass.), 485, it is said that: "Where a witness is sought to be impeached by cross-examination or independent evidence, tending to show that at the time of giving his evidence he is under a strong bias, or in such a situation as to put him under a sort of moral duress to testify in a particular way, it is competent to rebut this ground of impeachment, and to support the credit of the witness, by showing that when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those he made at the trial."

In the case of *Yarbrough v. State*, 105 Ala. 43, [16 South. 758], a witness on behalf of the state testified that she had heard the defendant conspiring with others to commit the crime with which he was charged. On cross-examination evidence was elicited from her, showing that a short time before she gave this information to the person assaulted she herself had been arrested on a criminal charge preferred by the defendant. To rebut the unfavorable inference thus arising from such evidence, it was held admissible to show that the witness had given the same information to the person assaulted and to others, before her arrest on the charge preferred by defendant. The court further said: "The distinction must be kept in mind between such evidence and its purpose, and when a witness attempts to corroborate his own evidence, by proof of having made similar statements to others, the latter is inadmissible. It is mere hearsay, and not competent as tending to prove a fact; but when it is sought to discredit the witness, by attributing his or her testimony to some act on the part of the person testified against calculated to excite unfriendly feelings in the witness, in rebuttal from the inference to be drawn from such act it may be shown that the witness made the same statement prior to the time when the proven act occurred. This evidence could not be considered as original or corroborating evidence of the truth of the

fact testified to, but purely in rebuttal of the inference, that the testimony was manufactured or the result of the unfriendly act." (See, also, *Hewitt v. Corey*, 150 Mass. 445, [23 N. E. 223]; *People v. Doyell*, 48 Cal. 85, 91; *Barkly v. Copeland*, 74 Cal. 1, [5 Am. St. Rep. 413, 15 Pac. 307]; *Cal. Electric Light Co. v. California Safe Deposit etc. Co.*, 145 Cal. 124, [78 Pac. 372].)

The text-books also support this view. (See Wharton's *Criminal Evidence*, 9th ed., sec. 492; Wigmore on *Evidence*, secs. 1129, 1130.)

Detective Kyle corroborated the testimony that Valmini, two or three days after the larceny, recognized the photograph of the defendant. This testimony, as we have just seen, was competent. During the examination of this witness something was said about the defendant having been in trouble before. This matter, however, was interjected into the case by defendant's counsel, and therefore, of course, did not constitute a violation of the provisions of section 1025 of the Penal Code by the prosecution.

The judgment and order are affirmed.

Hall, J., and Lennon, P. J., concurred.

[Civ. No. 910. First Appellate District.—February 21, 1912.]

ANITA B. REIOS and JAS. P. SWEENEY, Appellants, v.
J. D. MARDIS and ENTERPRISE BREWING COMPANY, a Corporation, Respondents.

GUARANTY OF RENT RESERVED IN LEASE—ASSIGNMENT BY LESSOR—ACTION BY ASSIGNEE.—An assignee of a lease from the lessor and of a written contract of guaranty to secure the payment of the rent reserved, which was executed contemporaneously with the lease and was made part thereof, which guaranty was neither expressly nor impliedly limited to the lessor personally, may sue both the lessee and the guarantor in his own name as assignee to collect the rent and to enforce the same against the guarantor.

- ID.—MODIFICATION OF COMMON-LAW RULE FORBIDDING SUIT BY ASSIGNEE OF CHOSE IN ACTION.**—The common-law rule that a chose in action cannot be transferred by assignment, so as to enable the assignee to sue thereon in his own name, has been materially modified, if not entirely superseded, by the code provisions of this state, which authorize a non-negotiable chose in action to be transferred with all the rights of the assignor, subject to equities and defenses against the assignor, and require every action to be prosecuted in the name of the real party in interest.
- ID.—EFFECT OF CODE PROVISIONS—ACTION BY ASSIGNEE OF CONTRACT OF GUARANTY.**—The immediate effect of the code provisions of this state is to permit the assignee of a contract of guaranty of rent, which is but a chose in action, to sue thereon in his own name, and where there is no personal limitation of the guaranty, it may, like any other promise made to the lessor, be assigned and sued upon by the assignee.
- ID.—ASSIGNMENT OF LEASE WITH CONSENT OF GUARANTOR—PERSONAL LIMITATION IMMATERIAL.**—Where it appears that the assignment of the lease and of the contract of guaranty was made with the consent of the guarantor, the contention that the assignment of the lease was personal to the lessor must fail in the presence of that fact.
- ID.—GUARANTY PART OF LEASE ASSIGNED AS SINGLE CONTRACT—ASSIGNMENT OF LEASE CARRYING GUARANTY—REMEDIES OF ASSIGNOR.** Where it further appears that the guaranty was so executed as to become part of the lease itself, the lease and guaranty must be construed to be a single contract, upon which the liability of the guarantor, to the extent of his obligation, was commensurate with that of the lessee; and the assignment of the lease by the lessor carried with it the same remedies for the recovery of rent and for nonperformance of the lease as the assignor might have had in the first instance.
- ID.—PLEADING—COMPLAINT BY ASSIGNEE OF LEASE AND GUARANTY—AYEEMENT OF ASSIGNMENT—PRESUMPTION OF WRITING—RULINGS UPON DEMURRER.**—Conceding that a general order sustaining a demurrer will be upheld, if tenable on any ground assigned, and that leave to amend may be granted or withheld in the discretion of the court, yet where it appears that a special demurrer to the complaint by the assignee of the lease and guaranty is untenable, a general demurrer thereto cannot be sustained if the complaint states a cause of action, even though some of the facts relied on to support it are defectively pleaded. When, therefore, such complaint is otherwise sufficient, and states the assignment of the lease and guaranty as a fact, it will be presumed in support of its sufficiency that the assignment was in writing.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Jas. P. Sweeney, and Jos. P. Lucey, for Appellants.

L. S. Melsted, for Enterprise Brewing Company, Respondent.

LENNON, P. J.—In this action plaintiffs sought to recover the sum of \$3,000, alleged to be due and unpaid as rental from the defendant, J. D. Mardis, for the use and occupation of certain premises in the city and county of San Francisco, pursuant to the terms of a written lease entered into between plaintiffs' assignor and the defendant Mardis. The Enterprise Brewing Company, a corporation, was joined as a party defendant, and judgment prayed for against it in the sum of \$1,500, because of its alleged liability under a written guaranty for the payment of the rent reserved in the lease.

In substance it appears from the plaintiffs' complaint that the defendant Mardis, after entering upon the use and occupation of the leased premises, failed to pay the stipulated rent for several months preceding the commencement of the action. The guaranty was executed contemporaneously with the lease and was made a part thereof. The execution of the lease was the expressed consideration for the guaranty. By its obligation the guarantor promised and agreed that the lessee would pay all the rent due or to become due under the lease, and perform every other condition thereof, and if the lessee defaulted in any of the conditions of the lease, the guarantor would hold the lessor harmless to the extent of \$1,500. Prior to the default of Mardis, the lessor, for a valuable consideration, and with the consent of the guarantor, assigned the lease and guaranty to plaintiffs.

A general and special demurrer to the complaint interposed on behalf of the corporation defendant was sustained by the court below without leave to amend. Judgment was thereupon rendered and entered for said defendant, from which the plaintiffs appeal.

It seems to be conceded that the demurrer was sustained and the privilege of amending denied to the plaintiffs solely upon the ground that the guaranty sued upon was not assignable, and could not as a matter of law be made the basis of a cause of action against the guarantor. At any rate, the question of the assignability of the guaranty is the only point raised in the briefs in support of the demurrer; and inasmuch as the complaint in all of its essential features appears on its face to be fairly free from the fault of ambiguity and uncertainty, the special grounds of demurrer, in so far as they relate to the certainty and clearness of the allegations of the complaint, need not be considered.

In support of the lower court's ruling sustaining the demurrer, it is contended that a contract of guaranty cannot be enforced except by the party to whom it was given; that the guaranty in the present case was addressed to the lessor named in the lease without a provision permitting its assignment, and therefore was personal to him, and could not be assigned so as to give the assignees a right of action thereon.

This contention is based upon the common-law rule which prohibited an assignee from suing in his own name upon a chose in action, or any promise or other liability other than negotiable paper, originally running to his assignors. (2 Blackstone, 467, 468; 2 Chitty on Contracts, p. 1357; Daniel on Negotiable Instruments, sec. 1.)

The common-law rule that a chose in action was not negotiable in the sense that it was transferable so as to enable the assignee to maintain an action thereon has been materially modified, if not entirely superseded, by statute in this state. Save, therefore, as a matter of history, the numerous cases cited by respondents from other jurisdictions, where, in the absence of statutory regulation, the rule of the common law prevails, have little, if any, bearing upon the question presented here; and in so far as they are in conflict with the statutory rule in force in this state, must be disregarded.

The right to recover money by a judicial proceeding is defined to be a thing in action, which, if it arises out of an obligation, may be transferred by the owner without prejudice to any setoffs or other defense existing at the time of or before notice of assignment; and a written contract for the payment of money, even though it be non-negotiable in form, may be

transferred with all the rights of the assignor in like manner with negotiable instruments, subject, however, to all the equities and defenses existing in favor of the maker of the contract at the time of the transfer. (Civ. Code, secs. 953, 954, 1458, 1459; Code Civ. Proc., sec. 368.)

In this state "Every action must be prosecuted in the name of the real party in interest" (Code Civ. Proc., sec. 367); and whatever the common-law rule, or the reason for its origin, may have been, it is certain that the immediate effect of the several code sections just cited is to permit the assignee of a contract of guaranty—which is but a chose in action—to sue thereon in his own name. (*La Rue v. Groezinger*, 84 Cal. 281, [18 Am. St. Rep. 179, 24 Pac. 42]; *Rued v. Cooper*, 109 Cal. 682, [34 Pac. 98]; *Simmons v. Zimmerman*, 144 Cal. 256, [1 Ann. Cas. 850, 79 Pac. 451]; *Weir v. Anthony*, 35 Neb. 396, [53 N. W. 206]; *Small v. Sloan*, 1 Bosw. (N. Y.) 352; *Wood v. Farmer*, 200 Mass. 209, [86 N. E. 297]; *First Nat. Bank v. Carpenter*, 41 Iowa, 518; see *Cunningham v. Norton* (Cal.), 40 Pac. 491.)

If the contract of guaranty in the case at bar had been specifically limited to the lessor named in the lease, there would have been much force in the contention that the obligation of the guarantor was purely personal, and that its assignment, before default of the lessee, operated as a discharge of the obligation. Here, however, there was no limitation of the guaranty, either expressly or impliedly, to the lessor personally, and like any other promise made to him, it could be assigned and sued on by the assignee. (20 Cyc. 1431, 1483; *Stillman v. Northrup*, 109 N. Y. 473, [17 N. E. 379].)

Moreover, respondent's contention in this particular must fail in the presence of the fact, alleged in the complaint, that the assignment of the lease and guaranty was made with the consent of the guarantor (Civ. Code, sec. 2819; *Pac. Press Pub. Co. v. Loofbourow*, 129 Cal. 25, [61 Pac. 944]). Aside from these considerations, the language of the guaranty, which is set out in full in the complaint, indicates that it was executed and indorsed upon the back of the lease contemporaneously with the execution of the lease, and thereby became a part of the lease itself. (*Jones on Landlord and Tenant*, sec. 662; *Otto v. Jackson*, 35 Ill. 349; *Evoy v. Tewksbury*, 5 Cal. 285; *Hazeltine v. Larco*, 7 Cal. 32; *Otis v. Haseltine*, 27 Cal. 80.)

This being so, the lease and the guaranty must be construed to be but one instrument, constituting a single contract, upon which the liability of the guarantor, to the extent of its obligation, was commensurate with that of the lessee (*Bagley v. Cohen*, 121 Cal. 604, [53 Pac. 1117]), and the assignment carried with it the same remedies for the recovery of the rent reserved, or for the nonperformance of the terms of the lease, as the assignor might have had in the first instance. (Civ. Code, sec. 821.)

Upon the oral argument of the case it was suggested by counsel for the respondent that the complaint did not state facts sufficient to constitute a cause of action, in this, that the assignment of the lease and guaranty was not alleged to be in writing. It was insisted that the demurrer to the present and to each of three preceding complaints covered this particular point, and that if this be so and the point be well taken, the trial court did not abuse its discretion in refusing plaintiffs permission to amend, and consequently the judgment should stand, regardless of any other theory which, perchance, may have been the real reason for the trial court's ruling upon the demurrer.

It may be conceded that if a general order sustaining a demurrer be well founded upon any of the grounds stated in the demurrer, the order will be upheld, notwithstanding the lower court's erroneous reliance upon another and different ground to support its ruling. (*People v. Central Pac. R. R. Co.*, 76 Cal. 29, [18 Pac. 90]; *Wakeham v. Barker*, 82 Cal. 46, [22 Pac. 1131]; *Sechrist v. Rialto Irr. Dist.*, 129 Cal. 640, [62 Pac. 261].) It may also be conceded that leave to amend is a privilege which, in the exercise of a sound discretion, may be granted or withheld by the trial court, and that several repeated failures to properly amend a complaint in an essential particular, which is capable of amendment, would be ample justification of the trial court's refusal of further permission to amend. (*Billesbach v. Larkey*, 161 Cal. 649, 120 Pac. 31.)

In the case at bar, however, the demurrer, in so far as it related to the sufficiency of the facts stated to constitute a cause of action, was general in its nature. It did not purport to single out and assail the sufficiency of the allegations of the complaint relating to the assignment of the lease and guaranty,

and, therefore, if the complaint as a whole stated a cause of action, the demurrer, being general, could not have been rightfully sustained, even though some of the facts relied upon to constitute a cause of action may have been defectively and imperfectly pleaded. (*Hulsman v. Todd*, 96 Cal. 228, [31 Pac. 39]; *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 41, [38 Pac. 517].)

By the provisions of section 1971 of the Code of Civil Procedure no interest in real property, other than a lease for a term not exceeding one year, can be created or assigned otherwise than by operation of law or by an instrument in writing subscribed by the party creating or assigning the same. While the language of this section controls the creation and transfer of a lease, and forbids the transfer by parol of such an interest in real property, nevertheless, in counting upon such an assignment if the pleading avers that it was in fact made, the law will presume, in support of the sufficiency of the pleading, that such assignment was in writing. (3 Sutherland's Code Pleading, sec. 5257; *Patent Brick Co. v. Moore*, 75 Cal. 205, [16 Pac. 890]; *Van Doren v. Tjader*, 1 Nev. 322, [90 Am. Dec. 498].)

The judgment appealed from is reversed, and the lower court directed to overrule the demurrer, with leave to the defendant to answer within such time as the court may designate.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 940. First Appellate District.—February 21, 1912.]

L. HARTER COMPANY, a Corporation, Respondent, v.
ELVIRA GEISEL et al., Defendants; THE UNITED
STATES FIDELITY AND GUARANTY COMPANY,
a Corporation, Appellant.

CLAIM AGAINST ESTATE—FINAL DECREE SETTTLING ACCOUNT AND ORDERING PAYMENT—TIME OF PRESENTATION—COLLATERAL ATTACK BY SURETY ON BOND.—A decree settling the final account of an administratrix and directing the payment of a settled claim against the estate, the time for appeal from which has elapsed, is conclusively binding upon the surety of the administratrix, in case of her final noncompliance therewith, and the surety cannot collaterally attack

the decree by showing that the claim was forever barred by reason of the fact that it had not been presented within the time limited by law and by the notice to creditors.

ID.—GENERAL JURISDICTION OF SUPERIOR COURT IN PROBATE—OBJECTION TOO LATE.—The jurisdiction of the superior court, when sitting in a probate proceeding, is that of a court of general jurisdiction; and its order for the payment of the debts of a decedent's estate, as the circumstances may require, is within its jurisdiction, and is part of the settlement of the account; and an objection made after the decree ordering a claim to be paid has become final that it was not presented to the administratrix as required by law comes too late.

ID.—FAILURE TO PRESENT CLAIM IN TIME NOT JURISDICTIONAL ON FINAL SETTLEMENT—MATTER OF ERROR—ABSENCE OF FRAUD—CONCLUSIVENESS.—The failure to present a claim in time does not go to the jurisdiction of the court to direct its payment upon final settlement of the account. It is only matter of error to be corrected on appeal, and it cannot be otherwise objected to, in the absence of fraud or collusion, which has not been here alleged or claimed. If not legitimately assailed, the order settling the final account and directing payment of the claim is conclusive upon all persons interested in the estate, whether heirs, legatees, or creditors.

ID.—FINAL OFFICIAL DUTY OF ADMINISTRATRIX TO COMPLY WITH ORDER—BREACH—CONCLUSIVENESS UPON SURETY.—Where the decree of final settlement of the claim and directing its payment has become final and conclusive as to all parties interested in the estate, it then becomes the final official duty of the administratrix to comply with the order directing her to pay the same, and the breach of such official duty is a breach of official trust which is not only conclusive upon the administratrix, but also, in the absence of fraud or collusion, is conclusive against the surety upon her official bond, who, by the terms of the bond, is liable therefor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Thomas, Frick & Beedy, for Appellant.

S. J. Hankins, and Wm. J. Hayes, for Respondent.

HALL, J.—Plaintiff brought this action to recover of Elvira Geisel, as principal, and the United States Fidelity and Guaranty Company, as surety, the sum of \$1,587.31, being the

amount of plaintiff's claim against the estate of Eugene Emil Geisel, deceased, ordered by the superior court to be paid to plaintiff by said Elvira Geisel upon the settlement of her final account as administratrix of said estate.

Defendant Elvira Geisel, after demurrer overruled, failed to answer to the complaint, and her default was duly entered.

The surety, the defendant corporation, answered the complaint, but upon motion of the plaintiff the court entered judgment against it upon the pleadings for the amount sued for. From this judgment said defendant has appealed to this court.

The complaint sets up the various matters of inducement concerning the appointment of Elvira Geisel as administratrix of the estate of said deceased by the superior court of the city and county of San Francisco, the giving and approval of the bond sued on, and the like.

It is then alleged, "That on or about the 21st day of January, 1909, said court duly approved and allowed the claim of said plaintiff against the estate of said deceased for the sum of \$1,587.31."

"That on or about the 26th day of May, 1909, said court duly and regularly made, rendered and signed a judgment and decree, settling the first and final account of said executrix; that said judgment ordered, adjudged and decreed that there was a sufficiency of assets for the payment in full of the indebtedness of said estate, and further directed that said executrix pay to said plaintiff the sum of \$1,587.31."

Additional allegations show that said judgment and decree was entered in the minutes of the court August 20, 1909; that it has never been appealed from, and has become final, and is in full force and effect, and that no part of the said sum of \$1,587.31 has been paid to plaintiff.

The only defense attempted to be set up in the answer of appellant is that the claim of plaintiff ordered to be paid in the decree settling the final account of the administratrix was not presented to the administratrix for allowance within the time limited by the law and the notice to creditors.

This defense is in part pleaded in certain denials, and also in affirmative allegations contained in the answer. It is insisted by respondent that the denials are sham and insufficient, as being made for want of information and belief as to mat-

ters that presumptively appear of record. But for the purposes of this discussion, we think we may treat the denials as properly made.

So treating the denials, the question to be determined upon the record in this case is correctly stated by appellant in its brief in these words: "Does the decree settling the final account of the administratrix and directing the payment of the claim of the plaintiff conclusively bind the surety, or may it collaterally attack the decree by showing that the claim was forever barred by reason of the fact that it had not been presented within the time limited in the notice to creditors?"

This question, we think, must be answered against the contention of appellant. It is not pretended that any irregularity occurred as to the notice given, hearing and settlement of the final account, except that this particular claim should not have been allowed by the court or ordered paid, because not presented to the administratrix within the time directed by the notice to creditors. The attack upon the decree is limited to this point.

The superior court sitting in probate is a court of general jurisdiction. (*Estate of Davis*, 151 Cal. 318, [121 Am. St. Rep. 105, 86 Pac. 183, 90 Pac. 711].)

Upon the settlement of the account of the administratrix the court must make an order for the payment of the debts of the estate as the circumstances of the estate require. (Code Civ. Proc., sec. 1647.) Such order for the payment of the debts is within the jurisdiction of the court, and is a part of the settlement of the account. An objection, made after decree ordering claim to be paid has become final, that it was never presented to the administratrix, comes too late. (*Estate of Cook*, 14 Cal. 130.) This case (*Estate of Cook*) really disposes of the fallacy that lies at the bottom of the argument of appellant, to wit, that the failure to present a claim in time goes to the jurisdiction of the court to direct the payment of such claim upon the settlement of the account. It is a matter of error, to be corrected on appeal, and not a matter of jurisdiction which will invalidate the decree upon any collateral attack. The order of settlement and allowance by the court is conclusive against all persons in any way interested in the estate, and can only be attacked in the absence of fraud and collusion upon appeal.

(Code Civ. Proc., sec. 1637; *Estate of Cook*, 14 Cal. 130; *Estate of Marshall*, 118 Cal. 379, [50 Pac. 540]; *Estate of Grant*, 131 Cal. 426, [63 Pac. 731]; *Estate of McDougald*, 146 Cal. 191, [79 Pac. 878]. See, also, *Gordon v. Gordon*, 55 N. H. 399; *Florentine v. Barton*, 2 Wall. (U. S.) 210, [17 L. ed. 783].)

The heirs, devisees, legatees and creditors are of course interested in the disposition that the court may make of the funds found to be in the hands of the administrator, and if injuriously affected thereby may in proper time appeal from the order of the court disposing of the estate. If they do not do so, they are bound by the decree made by the court; and it necessarily becomes the duty of the administrator to dispose of the funds in his hands as directed by the order of the court.

"The disposition which the court might make of moneys in their hands belonging to the estate is immaterial to the administrators. All that they are concerned in upon a settlement of their account is to be credited with the various payments they have made, and to have the accounts settled according to the correct amount in their hands. Whatever disposition the court makes of this amount is no concern of theirs, and, if the parties interested therein make no objection to the order, they should be content." (*Estate of Sarment*, 123 Cal. 331, [55 Pac. 1015].)

From the authorities hereinbefore cited, and the discussion thus far had, we think it is demonstrated that when the parties interested in an estate have allowed a decree settling an account and directing the payment of claims, made after due notice, to become final, such decree is, as to all persons interested in the estate, protected from collateral attack, unless it may be for fraud or collusion, which is not alleged or claimed in the case at bar.

All parties in interest being bound by a decree so made, it becomes the plain duty of the administrator to comply with such decree. His refusal so to do is a violation of his duty as administrator, for which the person injured thereby may hold his surety. Such order, in the absence of fraud or collusion, is conclusive not only against the administrator but also against the surety. (*Irwin v. Backus et al.*, 25 Cal. 214, [85 Am. Dec. 125].)

The cases cited by appellant from other jurisdictions, to the effect that a judgment obtained by a claimant, against an administrator, may be attacked by the surety when sued thereon, because the claim was barred for want of presentation in time, have no application under a system such as we have in this state, where, upon the presentation of the administrator's account, all persons interested in the estate are brought under the jurisdiction of the court by notice, and the court is authorized to make a decree binding upon all persons interested in the estate. While under our system the surety may not be before the court upon the settlement of an account, his principal and all persons interested in the estate are, and are bound by the decree. The breach of duty by the administrator consists in his refusal to comply with an order made by a court having jurisdiction of the subject matter and the parties in interest. Such a refusal is a breach of his trust as such administrator, and by the very terms of the bond the surety is liable therefor.

The judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1044. Second Appellate District.—February 21, 1912.]

DIXON L. PHILLIPS, Appellant, v. BERTIE LOGAN,
Respondent.

**VENUE—CHANGE OF PLACE OF TRIAL TO RESIDENCE OF DEFENDANT—
ERRONEOUS ORDER—INSUFFICIENT AFFIDAVIT OF MERITS.**—An order changing the place of trial to the residence of the defendant is erroneous and must be reversed where the court's ruling is based upon an insufficient affidavit of merits, "that affiant has fully and fairly stated the facts of her case herein to her attorney," by whom she was advised that she had a good and valid defense to the action. Such affidavit in effect stated that she had merely stated her defense and not all of the facts of the case, as required.

APPEAL from an order of the Superior Court of Kings County changing the place of trial. John G. Covert, Judge.

The facts are stated in the opinion of the court.

Dixon L. Phillips, *in pro. per.*, and W. A. Strong, for Appellant.

E. S. Bell, for Respondent.

SHAW, J.—Plaintiff appeals from an order of the superior court granting defendant's motion for a change of the place of trial from Kings county to the county of Napa, wherein she resided at the time of the commencement of the action.

The error in the court's ruling is based upon the alleged insufficiency of the affidavit of merits made by defendant, wherein it was stated "that affiant has fully and fairly stated the facts of her case herein to her attorney," by whom she was advised that she had a good and valid defense upon the merits of the action. Upon the authority of *Nickerson v. California Raisin Co.*, 61 Cal. 268, and *People v. Larus*, 66 Cal. 235. [5 Pac. 157], the court erred in granting the motion. The statement contained in the affidavit of merits that defendant had stated *her case was*, in effect, saying that she had stated merely her defense.

The order appealed from is reversed.

Allen, P. J., and James, J., concurred.

[Crim. No. 203. Second Appellate District.—February 21, 1912.]

THE PEOPLE, Respondent, v. ED. HARRISON, Appellant.

CRIMINAL LAW—IMPANELING JURY—PEREMPTORY CHALLENGES—PANEL DEPLETED—PREJUDICIAL ERROR NOT SHOWN.—Though it is the usual and better practice to have a full panel in the jury-box, in a criminal case, before requiring the exercise of peremptory challenges, yet where a full panel had been sworn on their *voir dire*, and four of them had been excused as disqualified, and no prejudice appears to the defendant, in such case, from being required to exercise peremptory challenges upon the remainder of the panel, and there being no code provision or express ruling of the supreme court applicable to such facts, it is held that no reversible error was committed.

1D.—CHALLENGES TO JURORS FOR CAUSE—ERRONEOUS IMPRESSIONS AS TO LAW—CONFLICT—GUIDANCE BY INSTRUCTIONS—PROPER DISALLOW-

ANCE.—An impression in the mind of one juror, due to an erroneous idea as to the failure of the defendant to take the stand as a witness, and an impression in the mind of another juror, due to an erroneous idea as to the presumption of innocence with which the law clothes the defendant, does not necessarily show a disqualification of either of such jurors for cause, where the evidence in each matter is conflicting, and each of said jurors stated on cross-examination that he would be guided as to the matter wholly by the court's instructions. In such case each challenge for cause was properly disallowed.

ID.—EVIDENCE—OBJECTION TO PROSECUTRIX AS INCOMPETENT—EXPERT WITNESS—PRESUMPTION—EXAMINATION BY COURT—DISCRETION NOT DISTURBED.—It appearing that the prosecutrix under a charge of statutory rape was fifteen years of age, she was, under the law, presumed to be competent to testify; and where her competency was objected to, and defendant offered an expert witness to the contrary, and a preliminary examination as to her competency was had by the court, out of the presence of the jury, and the court became satisfied from her understanding and answers that she was competent to testify, the discretion exercised in view of her answers, in favor of the presumption of competency, will not be disturbed.

ID.—PROPERTY OF PRELIMINARY EXAMINATION OF WITNESS BY COURT.—The preliminary examination of the witness, whose competency was objected to, by the court, was proper, and afforded the very best evidence upon which to determine the question of competency, which was matter solely for the trial judge to determine, as a question of law, preliminary to the admission of her testimony in evidence. The jury were not concerned with that question of law, and the court, in the exercise of its discretion, properly excluded it from hearing the evidence required to determine that question. It is only the evidence adduced at the trial that must be made in public and in the presence of the accused.

ID.—PROPER EXCLUSION OF EVIDENCE OF PHYSICIAN AT TRIAL—REMOTE EVIDENCE AS TO INCOMPETENCY.—Where, after the court had determined the question of competency of the prosecutrix, and her testimony had been admitted in evidence, the defendant, as part of his case, offered the evidence of a physician, by whom it was proposed to show the condition of the girl's mind some two years before the introduction of her testimony in evidence, the court properly sustained an objection to such evidence as too remote.

ID.—EVIDENCE OF PHYSICIAN NOT ADMISSIBLE FOR IMPEACHMENT.—The evidence of such physician was not admissible for the purpose of impeachment, for the reason that it is not one of the modes prescribed in sections 2051 and 2052 of the Code of Civil Procedure, for impeaching a witness.

ID.—STATUTORY RAPE—SINGLE PRELIMINARY EXAMINATION OF PERSONS SEPARATELY CHARGED—PART OF DEPOSITION OF DECEASED WITNESS.

The mere fact that two persons separately charged with the crime of statutory rape upon the person of the prosecuting witness were held to answer at one single preliminary examination, it appearing that the offenses were committed at about the same time and under the same surroundings, and that part only of the deposition of a deceased witness taken thereat related to the charge against the present defendant, cannot deprive the state of its rights, under section 686 of the Penal Code, to introduce such parts of the deposition as are competent evidence upon the trial of defendant.

ID.—REMAINDER OF DEPOSITION IN RECORD NOT PREJUDICING APPELLANT.

Under the rulings made upon the trial, the fact that the entire deposition is embodied in the record upon appeal, which shows clearly the parts admitted, cannot prejudice the defendant appealing.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

H. T. Miller, J. R. Dorsey, and Thomas Scott, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

SHAW, J.—Defendant was convicted upon an information charging him with statutory rape. He appeals from the judgment and an order of the court denying his motion for a new trial.

As grounds for reversal numerous errors are assigned, very few of which, however, merit other than general notice.

In impaneling the jury to try the case twelve men were called to the jury-box and, following their examination upon *voir dire*, four were excused upon the ground that they were disqualified. Without calling others to take the place of those so excused, and with the jury-box containing only eight qualified jurors, defendant, over his objection and contrary to his request that the box be filled, was required to exercise his peremptory challenges. In so ruling it is claimed the court erred. The code does not specify the particular stage of the proceedings when a peremptory challenge shall be interposed to an objectionable juror, and, so far as we are

advised, the supreme court has announced no rule applicable to the facts here presented. Under these circumstances, we are not inclined to hold that the court erred, particularly as it is not made to appear that defendant was in any wise prejudiced by such ruling. It has been held that in the impaneling of a jury to try a civil action neither party can be required to exercise his peremptory challenges until there shall be found in the box twelve men whom the court shall adjudge to be competent and qualified jurors. (*People v. Scoggins*, 37 Cal. 679; *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323, 330.) The reasoning of the court given in the latter case in support of the rule is equally applicable in support of a like rule in impaneling a jury in a criminal case, and we think the usual and better practice in criminal cases is to follow the rule there announced. Indeed, such we understand to be the prevailing practice in the courts of this state.

Defendant interposed challenges for cause to Mr. McLees and Mr. Buckmaster, who were called as jurors. Both challenges were denied; whereupon both proposed jurors were excused upon peremptory challenges made by defendant who, prior to the completion of the jury, exhausted the ten peremptory challenges allowed him. Appellant contends the effect of the ruling, since he was compelled to exercise two of his peremptory challenges in eliminating the two jurors whom it is claimed should have been excused for cause, was to deprive him of the use of two challenges, thus contracting the number to which he was entitled, and that the alleged error was not cured, notwithstanding the fact that he did not offer to exercise peremptory challenges to which he was not entitled, or otherwise indicate dissatisfaction with the jury or any member thereof as it was completed. In support of this contention he directs our attention to *People v. Weil*, 40 Cal. 268, and *People v. Helm*, 152 Cal. 532, [93 Pac. 99], which cases were followed by this court in deciding the case at bar on a former appeal. (*People v. Harrison*, 13 Cal. App. 555, [110 Pac. 345].) The Helm case differs from this in that it was shown by the record therein that defendant, after exhausting his peremptory challenges, was by the ruling of the court compelled to accept a juror whom he had challenged for cause. In its opinion however, the court said: "It makes no difference in this respect that no challenges for cause were inter-

posed by defendant to any jurors called to the box after the exhaustion of his peremptory challenges had been forced by the improper rulings of the court upon his challenges for cause. It may often happen that a juror most obnoxious to a defendant may successfully pass examination upon his *voir dire*. That examination may disclose no ground for the interposition of a challenge for cause. Yet there may be some reason known to the defendant which would make it most prejudicial to him that the juror should be retained. Even more, the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant; so that again we say that any rulings of a court which compel a defendant to exhaust his peremptory challenges and force him to accept jurors after his challenges have been so exhausted, become the proper subject of review." As against what was there said, we are confronted by the decision in the case of *People v. Schafer*, 161 Cal. 573, [119 Pac. 920]. If the challenges for cause interposed to McLees and Buckmaster were erroneously denied and defendant exhausted his peremptory challenges in relieving himself of these and other objectionable jurors before the jury was complete, all of which was done in this case, then, under the former decision on appeal in the case at bar (*People v. Harrison*, 13 Cal. App. 555, [110 Pac. 345]), the ruling was prejudicial error subject to review without interposing challenges for cause to jurors thereafter called to the box, or other expression of dissatisfaction with the jury. Under the rule, however, announced in this later case, alleged error in denying a challenge for cause is not subject to review under the circumstances here shown, unless it be made to further appear that defendant in some appropriate manner expressed his dissatisfaction with the jury as completed. Following this case, we might dismiss the discussion by stating that, notwithstanding the fact that defendant exhausted his peremptory challenges in getting rid of jurors who should have been excused for cause, the record fails to disclose facts entitling him to a review of the alleged error. Inasmuch, however, as what was said by this court on the former appeal was well calculated to have misled counsel as to the steps necessary to be taken in order to obtain a review of the alleged error, and the question arising as to whether or not that decision as to the

point involved does not constitute the rule of procedure in the subsequent trial, as to which fact, however, the justices of this court are unable to agree, we deem it proper to pass upon the alleged error of the court in denying the challenges for cause.

The objection to the qualification of the proposed juror Buckmaster was based upon the fact that on his *voir dire* examination he stated that, while he *would not* be prejudiced against defendant's case if he *failed* to take the stand as a witness, and that such failure *would not* in his mind relieve the prosecution of establishing defendant's guilt *beyond a reasonable doubt*, nevertheless, he *felt* that he *should* take the stand, and if accepted as a juror, he would go into the box with that impression and would arrive at a verdict on *less* evidence for the prosecution than if defendant was a witness in his own behalf. Not only does it appear that there was a conflict in the evidence, upon which the finding of the court must be deemed conclusive (*People v. Riggins*, 159 Cal. 113, [112 Pac. 862]), but the witness further stated on cross-examination that, notwithstanding his feeling, if the court instructed him that it was the right of the defendant not to go on the witness-stand, and that the fact of his refusal to testify should not be considered in reaching a verdict, he would and could without difficulty follow such instruction. The fact that the juror entertained an erroneous impression as to a matter of law subject to removal by an instruction of the court did not disqualify him, particularly when it was made to appear that as to such question he would be guided by the court's instructions.

The evidence as to the state of mind of Mr. McLees was likewise conflicting. While he had talked to two or three persons, not jurors or witnesses, about the case, such persons did not pretend to state to him any of the particulars or facts regarding the same, or attempt to give him any of the details thereof, and he entertained no opinion or impression as to the guilt or innocence of the defendant, and his condition of mind was such that he would be willing to be tried by a juror feeling as he did. He further testified that "what he had heard here" (presumably at the trial) led him to believe that he could not clothe the defendant at the inception of the trial with the presumption of innocence, by reason whereof

he stated it would require *less* evidence to prove defendant's guilt than if he had heard nothing about the case; that, notwithstanding such impression, he was quite certain that he could follow the instructions of the court as to the law which should govern the case, and if accepted as a juror he would do so, and was of opinion that he could act impartially and fairly in the case. As said in discussing the qualification of Buckmaster, the evidence is not only conflicting, but any impression existing in the mind of the proposed juror was due to an erroneous idea with reference to the presumption of innocence with which the law clothes a defendant at the inception of his trial, and as to which the juror stated he would be guided by the instructions of the court.

Defendant objected to the prosecutrix, Ruth Florence Sturtevant, testifying upon the ground that she was of unsound mind, and, as a witness, therefore, incompetent under the provisions of subdivision 1 of section 1880, Code of Civil Procedure. A preliminary examination was had from which the jury, over defendant's objection, was excluded, and at which hearing a physician was called by defendant as an expert witness, and whose testimony tended to show that the prosecutrix was of unsound mind in that, according to his opinion, she had not sufficient mentality to record events in her memory and correctly and truthfully relate and recount them. After the giving of his testimony, the witness herself, over defendant's objection, was examined upon her *voir dire*, after which the court determined that she was competent. Error is predicated upon each of these rulings. The witness was fifteen years of age and, under the law, presumed to be competent. It devolved upon defendant to prove her incompetent. In order to do this it must be made to appear by the record that the witness was wanting in sufficient intelligence to observe, recollect and communicate with regard to occurrences pertaining to the matter concerning which she was called to testify. The law, however, does not undertake to fix any standard of intelligence or capacity in this regard, but leaves its determination almost wholly to the discretion of the trial court. The testimony of the witness upon the preliminary examination, as disclosed by the record, shows that she possessed capacity mentally to understand the nature of questions put to her and give intelligent answers

thereto. This contradicts the opinion entertained by the physician. There is no evidence tending to show a want of a sense of moral responsibility, or any lack on the part of the witness of a recognition of a duty to make her answers correspond to her recollection and knowledge of the events as to which she was called upon to testify; hence, the existence of this element of competency must be presumed.

While the ruling of the court upon an objection to the competency of a witness made under subdivision 1 of section 1880, Code of Civil Procedure, is subject to review, and in this respect differs from like rulings upon objections to the competency of children under ten years of age (subd. 2, sec. 1880, *supra*), which rulings are not reviewable, nevertheless, from the nature of the case, and the fact that the law fixes no standard whereby to measure the competency of a witness alleged to be of unsound mind, the determination of the question is almost wholly in the discretion of the trial judge. (Wigmore on Evidence, sec. 496.) Indeed, we have been unable to find any decision where such ruling has been disturbed.

While appellant claims that the court erred in permitting an examination of the witness upon *voir dire*, he cites no authorities in support of the proposition. It seems clear to us that such an examination affords the very best evidence upon which to determine the question. The degree or kind of imbecility might be such as to render a witness wholly incompetent to testify upon one subject and at the same time fully competent to testify as to another matter. Moreover, the question to be determined is the condition of mind of the witness "at the time of his production for examination," which would seem to imply an examination of the witness himself.

The determination of the question of the competency of the witness was a matter solely for the trial judge. "Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." (1 Thompson on Trials, sec. 318.) The jury were in no wise concerned with the question of its competency; hence, the court in the exercise of its discretion very properly excluded it from the hearing of the evidence required in the determination of a question purely of law. "Everything having a

tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming to their knowledge during the trial." (1 Thompson on Trials, sec. 687.) We find nothing in the authorities cited by appellant wherein the courts have gone further than to hold that the examination must be made in public and in the presence of the accused.

After the court had ruled that the prosecuting witness was competent to testify, and after her testimony had been received, defendant, as a part of his case, called a physician as a witness, by whom he proposed to show the condition of the girl's mind as he found it at a period some two years preceding the time when she was produced as a witness. The court sustained an objection to the proffered evidence and error is predicated upon his ruling. The declared purpose of the evidence was to show that the prosecutrix was incompetent some two years prior to the time when she testified. In no event could the proffered evidence be received. The court had properly ruled upon the competency of the witness attacked; moreover, the evidence offered by defendant did not relate to the question of her mental condition at the time when she testified, but to a period long anterior thereto. Neither could it be admitted for the purpose of impeachment, for the reason that it is not one of the modes prescribed by statute (Code Civ. Proc., secs. 2051, 2052) for impeaching a witness.

Upon proof of the death of a witness who had testified at the preliminary examination, a transcript of his testimony, in so far as it was pertinent and related to the charge against defendant, was received in evidence. It appears that defendant and one Webb Edwards were each separately charged with a like offense committed upon the prosecutrix about the same time and under the same surroundings. By stipulation it was agreed that the preliminary examination in both cases should be held at the same time and together, and that the evidence introduced should be considered as evidence in each case. The mere fact that the preliminary examinations were held at the same time, at which a part of the evidence given by the deceased witness related to the charge against Edwards

and a part thereof was concerning the offense charged against defendant herein, did not deprive the prosecution of its right, under section 686, Penal Code, to introduce such parts of the deposition as constituted competent evidence upon the trial of defendant.

Numerous errors are predicated upon the rulings of the court in admitting evidence of what appear to be isolated and immaterial facts. In support of this contention defendant directs our attention to *People v. Edwards*, 13 Cal. App. 551, [110 Pac. 342], the judgment and order in which case were reversed upon the ground of the admission of evidence relating to incidents and transactions connected with an offense with which the defendant in that case was not charged. It was said there that "the major portion of the record is taken up with an account of a rape committed by the male companion of defendant upon the prosecuting witness." In that respect this transcript presents an entirely different case. We find no error in the rulings of the court in admitting evidence which upon this record could prejudice the rights of defendant.

The court refused to give several instructions requested by defendant, the subject matter of some of which had been covered by instructions elsewhere given. An examination of these rulings discloses no ground for complaint. The jury was fully and fairly instructed as to the law which should govern their consideration of the evidence in arriving at a verdict.

Mindful of the gravity of the offense charged and the severity of the judgment resulting from defendant's conviction, we have fully and carefully examined other alleged errors presented, but are unable to discover wherein any of the rulings complained of could by any possibility have prejudiced the substantial rights of defendant. The judgment and order appealed from are, therefore, affirmed.

James, J., concurred.

ALLEN, P. J., Concurring in the Judgment.—I concur in the judgment. The record, disclosing no reviewable error in denying the challenge of jurors for cause, renders unnecessary

any discussion of the question which would be involved had the action of the trial court resulted in restricting defendant's right of peremptory challenge conferred by statute.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 20, 1912.

[Civ. No. 371. Second Appellate District.—February 21, 1912.]

**CECIL DuBOIS and ALBERT G. THURSTON, Appellants,
v. L. H. PADGHAM, Respondent.**

RESTRAINT OF TRADE—CONTRACT BETWEEN PARTNERS UPON DISSOLUTION

—LIMITATION TO CITY—CONSTRUCTION OF CODE.—Under section 1673 of the Civil Code, every contract whereby one is restrained from exercising a lawful business is void, unless made pursuant to sections 1674 and 1675 of that code. While under section 1674 of the Civil Code one other than a partner may, where he sells the goodwill of a business, make a valid contract to refrain from carrying on a business similar to that sold within a specified county or city, the territorial limits as to which a partner may, by contract, restrict himself is under section 1675 of that code limited to a city or town.

ID.—INSUFFICIENT COMPLAINT AGAINST RETIRING PARTNER.—A complaint against a retiring partner who sold the goodwill of the business of publishing a directory in a specified city, and in soliciting contracts for advertising therefor throughout the county, which alleges a breach by entering into the publication of a directory in said county and in soliciting advertising therefor, which does not state that he published a directory for the same city, or sold any directory therein or solicited advertising therein, states no cause of action under section 1675 of the Civil Code for breach of the contract for sale of the goodwill of the partnership in said city.

ID.—CONSTRUCTION OF PLEADING AGAINST PLEADER.—A pleading must be construed most strongly against the pleader, and the general allegation that defendant "entered into the publication of a directory in said Orange county, and solicited advertising therefor, and in the same field and territory where plaintiffs were engaged in a similar business, and were exercising the goodwill purchased from said defendant as aforesaid," is wholly consistent with the fact that such publication was made and advertising solicited in other parts of the

county than the city where plaintiffs' directory is published; and so construed it fails to state a cause of action.

Id.—GENERAL DEMURRER — DEMURRER FOR UNCERTAINTY — JUDGMENT UPON DEMURRER—AMENDMENT NOT ASKED.—Where the court sustained both a general demurrer to the complaint and a demurrer for uncertainty, and rendered judgment upon the demurrer, from which the appeal is taken, and any construction of the pleading in favor of a cause of action would clearly render the complaint uncertain, the conclusion of the trial court was correct, in either point of view, and there having been no request for an amendment of the complaint, the judgment must be affirmed.

APPEAL from a judgment of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

Dick Foye Harding, and R. P. Condon, for Appellants.

Scarborough & Forgy, for Respondent.

SHAW, J.—The court sustained defendant's demurrer to the second amended complaint, interposed upon the grounds of failure to state a cause of action, misjoinder of parties and uncertainty therein; and, plaintiffs declining to further amend their complaint, judgment was rendered against them, from which they appeal upon the judgment-roll.

The complaint shows that DuBois and defendant were co-partners in the business of publishing a directory in the city of Santa Ana, in Orange county, their office and location of business being in the Rossmore Hotel building in said city; that the business so conducted consisted of the "preparation of matter for the issuance, publication, distribution and sale of a certain book and publication known as the Directory of the city of Santa Ana, and other and similar publications in other places in Orange county, including the sale of said book and books, and the soliciting of persons and corporations for professional cards, business advertisements, and any and all forms of advertising matter, and the receiving of remuneration for the space occupied in said publications thereby; and that the principal value of said business was, and its principal asset consisted of, the goodwill thereof"; that on January 11, 1910, defendant, in consideration of \$250 paid to him by

DuBois, sold his interest in the business to the latter, and executed an agreement as follows:

"For value received, I hereby transfer to Cecil Dubois all my right, title and interest in the directory and advertising business, now being conducted in the Rossmore Hotel building, the said Cecil DuBois to assume all indebtedness and contracts for advertising. I, L. H. Padgham, agree to not enter into the publishing of directories in Orange county, unless said Cecil Dubois abandons the business, or sells out to me or a partner of mine."

On February 21, 1910, DuBois sold and transferred to Thurston, his coplaintiff, a "one-half interest in all of said property formerly transferred to him by said L. H. Padgham, including an undivided one-half interest in the goodwill of said business"; that thereafter, as copartners, up to the time of the filing of the complaint, they conducted the same; that on or about February 15, 1910, which was before commencing the action, defendant, in violation of the terms of said agreement, "entered into the publication of a directory in said Orange county, and then and there and since has solicited advertising therefor" in the same territory where plaintiffs were likewise engaged, all to the damage of plaintiffs in the sum of \$300.

Section 1673, Civil Code, provides that every contract whereby one is restrained from exercising a lawful business is void unless made pursuant to the provisions of sections 1674 and 1675 of said code. At the time of the purchase by DuBois he and the defendant were copartners in the business. The right of a partner to make a contract in restraint of business is limited by the provisions of section 1675, which provides: "Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof." The sale necessarily worked a dissolution of the partnership, and was, therefore, made in anticipation of such dissolution. While under section 1674, Civil Code, one other than a copartner may, where he sells the goodwill of a business, make a valid agreement to refrain from carrying on a similar business to that sold within a specified county or city, the territorial limits as to which a partner may by con-

tract so restrict himself is, under section 1675, limited to a city or town. The restriction as to one must not exceed the territorial limits of the county, whereas as to the other it must not exceed the territorial limits of a city or town. Defendant's contract was not limited to any city or town, but by its terms he agreed not to enter into a business similar to that sold in Orange county. Even if it be conceded that, in order to render it valid, the contract should be limited in territorial extent to the city of Santa Ana (which question we do not decide), it does not appear from the complaint that defendant committed a breach of the contract by publishing any directories in the city of Santa Ana, it being alleged he "entered into the publication of a directory in said Orange county, and solicited advertising therefor, and in the same field and territory where plaintiffs were engaged in a similar business, and were exercising the goodwill purchased from said defendant as aforesaid." Such allegation is wholly consistent with the fact that such publication was made and advertising therefor solicited in other parts of the county than the city of Santa Ana, the exclusive right to all of which territory, as against defendant, plaintiffs claimed under the terms of the contract. A pleading must be construed most strongly against the pleader, and so construed the complaint fails to state a cause of action. Any other view than that here expressed would render the complaint clearly uncertain; so that whichever theory be adopted, the conclusion of the trial court was correct. Thurston was a proper party plaintiff. (*Johnston v. Los Angeles Distributing Co.*, 16 Cal. App. 321, [116 Pac. 973].)

It is unnecessary to discuss other points presented, further than to state that the affirmance of the judgment renders it unnecessary to pass upon respondent's motion to dismiss the appeal.

The motion is therefore dismissed and the judgment is affirmed.

Allen, P. J., and James, J., concurred.

[Civ. No. 885. Third Appellate District.—February 21, 1912.]

GEORGE McCOWEN and HALE McCOWEN, Appellants,
v. J. W. PEW, Respondent.

ACTION TO QUIET TITLE TO TIMBER LANDS—OPTION TO PURCHASE—SPECIFIC PERFORMANCE—CROSS-COMPLAINT—INDUCEMENT FOR RAILROAD ROUTE—BUILDING NOT A CONDITION.—In an action to quiet title to timber lands, in which defendant set up an irrevocable option to purchase the same, the specific performance of which was sought by cross-complaint, which alleged that defendant and his associates proposed to construct a railroad, the route for which depended largely upon purchases of timber lands, which plaintiffs well knew, and that the inducement and consideration moving plaintiffs to enter into said contract was the encouragement and inducement of the building of said railroad from Ukiah to Willits, in preference to other routes, it is held that the cross-complaint cannot be rationally interpreted to justify the inference that the actual building of such railroad constituted any part of the consideration moving plaintiffs to grant the option, or imposing the same as a condition precedent to defendant's right to a conveyance.

ID.—SUFFICIENCY OF CROSS-COMPLAINT TO STATE CAUSE OF ACTION—DECISION UPON LAST APPEAL—LAW OF CASE—DIFFERENT REASON IMMATERIAL.—The decision upon the last appeal that the cross-complaint of the defendant stated facts sufficient to constitute a cause of action is the law of the case as to its sufficiency upon the present appeal. It is immaterial that the question arose upon the last appeal upon the refusal of the trial court to admit any evidence in support thereof, while its sufficiency to state a cause of action is here urged for a different reason. The law does not countenance a piecemeal method of attacking a pleading, which is adjudged valid by the law of the case.

ID.—ABSENCE OF PROMISE AS CONSIDERATION OF OPTION—CONDITIONAL BENEFIT OF PURCHASERS.—Whatever inducement may have moved the plaintiffs in granting the option to defendant, it is held that no agreement or promise was made by defendant, in consideration of the option, to select any particular route, or that defendant or his associates undertook to do anything in consideration thereof; but that they merely contemplated that any future purchase of the timber lands, if paid for at full value under the option, would be an inducement for freight to be carried by them over one of four contemplated routes, for their benefit.

ID.—ALLEGED VARIANCE BETWEEN OPTION AND ACCEPTANCE IN FINDINGS FOLLOWING CROSS-COMPLAINT—LAW OF CASE.—The contention of plaintiffs that the findings disclose a variance between the option granted by the plaintiffs and the acceptance by the defendant, and do not support the judgment, is untenable, where it appears that the finding objected to in this particular substantially follows the averments of the cross-complaint, the sufficiency of which has become the law of the case whether under the decision of the supreme court upon the last appeal or under the decision rendered by the same court upon a first appeal thereto, which decided the point which is here made.

ID.—TIMBER CUT BY VENDORS DURING LIFE OF OPTION—ACCEPTANCE OF ORIGINAL OPTION—COMPENSATION—EFFECT OF ASSENT BY VENDEE.—Where the option was of the right to purchase eleven hundred and sixty acres of land at the rate of \$15 per acre within twelve months, and during the life of the option the vendors cut a large amount of timber from the land, and within the time limited defendant gave notice of the acceptance of the option according to its terms, but demanded compensation for the depreciation in value by the cutting of the timber, to which plaintiffs did not object but assented thereto in writing, they thereby distinctly recognized that the acceptance by defendant was of the identical option which they had granted to him, and which they agreed to make good by compensation.

ID.—RULE OF PART PERFORMANCE WITH COMPENSATION UPON SPECIFIC PERFORMANCE—REDUCTION OF PRICE NOT INVOLVED.—Where the vendor through his own fault is unable substantially to perform his whole contract, the vendee may, at his election, have specific performance in equity to the extent of the vendor's ability to perform, with compensation for the deficiency. This rule of equity is also embodied in section 3386 of the Civil Code. The rule of compensation does not involve a reduction of the price agreed to be paid, its sole object being to fill up the measure of value for the price agreed, which has been diminished by the vendor's fault.

ID.—WAIVER AND ESTOPPEL OF VENDORS.—The plaintiffs, as vendors, having expressly acquiesced in the acceptance of the option granted by them to defendant, and treated and recognized it as an acceptance of the precise option which they granted to him, they thus waived any objection to the acceptance on the ground that it varied from the terms of the option; and they are estopped to take advantage of their own wrong in deliberately changing the value of the property purchased by their unauthorized acts during the life of the option.

ID.—CONSIDERATION FOR OPTION—MERGER IN AGREEMENT.—It is unnecessary to inquire whether a finding as to the original consideration for the option is or is not supported, since the option

as an option agreement became *functus officio* when it was accepted by the defendant according to its terms during the existence of the option which had not been previously revoked, which acceptance was acquiesced in by the plaintiffs, making it a binding contract between the parties.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

H. C. McPike, and Robert Duncan, for Appellants.

Jesse W. Lilienthal, and James E. Pemberton, for Respondent.

HART, J.—The plaintiffs commenced this action for the purpose of securing a decree quieting their title to certain lands described in the complaint and declaring void and of no effect a certain written instrument out of which grows the claim by the defendant of an interest in or right to acquire title to the property so described.

To the complaint the defendant filed an answer, wherein he sets forth and reveals the nature of his interest in said property, alleging that it grows out of and is based upon a certain agreement of option between the plaintiffs and the defendant, whereby the owners tendered and offered to the latter the option to purchase, within twelve months from the date of the execution of said agreement, the real property described therein and referred to in the complaint, which said option he accepted.

The defendant also filed a cross-complaint setting up said agreement, and, among other things, alleging that, within the time limited by the agreement, he, in a written notice delivered to each of the plaintiffs, signified his election to exercise the option granted to him by said agreement to purchase the property referred to therein, and that he was ready, willing and able to pay for said lands, according to the terms of said option, "upon proper compensation to said defendant and deductions from said purchase price" for certain alleged encumbrances on said lands and for the depreciation in the value thereof by reason of the alleged destruction by the

plaintiffs, during the life of the option, of certain timber on said property. Upon the averments of the cross-complaint, the defendant asked for a decree specifically enforcing the agreement of sale which was the culmination of the option and its acceptance. Relief was further prayed for as to the issue involving the alleged encumbrances on the lands and the alleged destruction of the timber and the removal of the same from said property.

Judgment passed for the defendant, and this appeal is taken by the plaintiffs from said judgment and the order denying them a new trial.

This is the third appeal prosecuted in this cause. The first (*McCowen et al. v. Pew*, 147 Cal. 239, [81 Pac. 958]) involved the sole question whether, full performance of the contract of sale being impossible because of the breach thereof by the vendors in cutting and removing timber from the lands which are the subject of said contract, the compensation to which the vendee was entitled for the depreciation in the value of the property by reason of the cutting and removal of such timber should be based upon the value of the timber so removed at the time the defendant gave notice of his election to exercise the option or upon the value of said timber, if it had remained standing on the land, at the time of the near completion of a railroad with a special view to the construction of which the defendant, so it is alleged, sought and secured the option to purchase said lands. The evidence showed that said railroad was about completed at the time of the trial, and the trial court based its valuation of the timber so removed as of that time, had it then been standing on the land, and found for the defendant accordingly.

Upon the ground that the trial court erred in its ruling upon that question, the supreme court reversed the judgment and order and returned the cause to the court below for re-trial.

The second trial of the case resulted in a judgment for the plaintiffs granting them the relief prayed for in their complaint. The defendant appealed from said judgment and the order refusing him a new trial, and the cause was again reversed and remanded for trial *de novo*. The opinion of the supreme court on the last-mentioned appeal is reported in 153 Cal. 735 et seq. [15 Ann. Cas. 630, 21 L. R. A., N. S.,

800, 96 Pac. 693]. The points there urged for a reversal and decided in said opinion will be particularly noticed in connection with the consideration of the points urged here for a reversal of the judgment.

Before proceeding to a consideration of the points made by the appellants, however, it will perhaps be more conformable to an orderly course to briefly recite the facts of this protracted litigation. In doing so, we conceive that we can do no better than to state them in the language of the supreme court, in the case reported in 147 Cal., page 300, [81 Pac. 962], as follows:

"The plaintiffs were the owners of a tract of land containing about eleven hundred and sixty acres, and on October 16, 1899, they and the defendant Pew executed an agreement whereby they granted to Pew the option, during the ensuing twelve months, to acquire from the plaintiffs the land in question, for the sum of \$15 per acre. . . . Between the date of the making of the agreement and October 11, 1900, the plaintiffs cut and removed from about ten acres of the land in question a large quantity of redwood, pine and oak timber, the value of which and the particular time at which its value is to be determined is the principal issue in this case. On October 11, 1900, Pew, having received information of the cutting of the timber in question, gave notice in writing to the plaintiffs that he elected to exercise the right to acquire the land covered by the agreement, and offered, upon receiving a good title to the land, to pay for the same at the rate of \$15 per acre, less the loss in value of the land occasioned by the removal of the timber by the plaintiffs. There were certain encumbrances on the title, which constituted defects in the title, which were not removed until some time in December following, or about the 1st of January, 1901. The parties could not agree upon the amount to be deducted from the price on account of the removal of the timber, but, subject to the settlement of that question, the plaintiffs were ready to perform their agreement and convey a good title on the 6th of December, 1900. Not being able to agree upon the amount of compensation to be allowed for the timber removed, the plaintiffs claimed that the agreement had been forfeited, and in March, 1901, brought the present action against the defendant to quiet title. Pew filed a cross-complaint, setting

out the agreement aforesaid, averring the election to acquire title thereunder by himself and those associated with him, and their purpose in acquiring the lands as aforesaid, and asking that the court enforce specific performance of the contract according to its terms, and allow a deduction from the price as compensation for the loss to him by reason of the timber removed by the plaintiffs prior to the time he gave notice of his election to exercise the option."

The agreement of option, or the part thereof important or specially material to the inquiry here, reads as follows:

"Now, therefore, for value received by said party of the first part [plaintiffs] from said party of the second part [defendant], and to induce said party of the second part to undertake the disposition of said property, said party of the first part has granted unto said party of the second part, his representatives and assigns, for the period of twelve months from the date hereof, an exclusive and irrevocable option to acquire from said party of the first part for said party of the second part, or his assigns, or such parties as he may negotiate with, for the sum of \$15 per acre, a good and sufficient title to the property situate in Mendocino county, state of California, and more particularly described as follows:" Then follows a description of the property. Said agreement was signed and executed by both the plaintiffs and the defendant, and was recorded in the office of the county recorder of Mendocino county, on the twenty-first day of September, 1900.

Counsel for the appellants, at the oral argument, expressly abandoned the appeal from the order, thus waiving any alleged errors of law occurring at the trial, and declared that they relied, and would rely, solely upon the points made upon the appeal from the judgment. We shall, therefore, in the consideration of this appeal, confine ourselves to a review and decision of what is in effect the single proposition, urged in the oral argument with the skill of a master and the vigor that is the offspring only of unfeigned earnestness, submitted here, viz., that the cross-complaint is bad for want of sufficient facts.

This postulate is sought to be supported and sustained chiefly by two points, the first of which in the order in which we shall consider them being a direct attack on the sufficiency of the cross-complaint to state a cause of action, and the second involving a direct attack on the findings, which, since in that

regard they follow, substantially, the allegations of the cross-complaint, may also be treated as challenging that pleading on the ground that the facts therein stated are not such as to entitle the defendant to the relief demanded thereby and as awarded by the decree.

These points may be stated as follows: 1. That, while, confessedly, the agreement of option contains no language even remotely indicating that the building of the railroad referred to on and over a certain route, or, to state it concretely, over the route from Ukiah to Willits, in preference over other routes which were within the contemplation of the projectors of said road, constituted a consideration moving the plaintiff to grant the option in question to the defendant, yet the averments of the cross-complaint themselves disclose that the building of said road along the indicated route was, in point of fact, the consideration supporting said option, and that further disclosing that said railroad over and along said route was not completed at the time of the exercise by the defendant of his election to purchase the property in dispute in pursuance of said option, the pleading of the defendant, therefore, signally and completely fails to show or set forth a contract for the sale and purchase of the property or a contract whose terms can be specifically enforced. In other words, to state this proposition—the premise and the conclusion therefrom—in the language of learned counsel for the appellant in his oral argument before this court: “The plaintiffs were the owners of a tract of timber land in Mendocino county. The defendant contemplated an extension of the North Pacific Railway, and had under consideration four different routes, one of which ran from Ukiah to Willits. He proposed selecting the line along which he should secure options upon timber lands. With full knowledge of these facts the plaintiff granted him, in consideration of his building on the route from Ukiah to Willits, the right to purchase, at his option, their property within a designated time. When the time was about to expire, the defendant demanded a conveyance. The extension not being built, the plaintiffs refused to convey. That, under these circumstances, the plaintiffs were under no obligation to convey, is a proposition which would seem hardly to require argument. As the building of the road from Ukiah to Willits was the consideration of the right to a conveyance, the road must, of

course, be built, before that right could be exercised. If I promise to give you something in consideration of your doing something, surely you may not ask for the thing I am to give until you have done the thing you are to do." 2. That the offer or option granted by the plaintiffs was never accepted, it appearing from the findings "that the offer was to sell at a certain price, and the proposal to buy at a different price." In other words, the contract made is not the one upon which the defendant relies in this action.

There are other objections aimed at the findings and cross-complaint, among which is the one involving the contention that the option granted by the plaintiffs to the defendant was not supported by any consideration.

If, as before suggested, as to the proposition that the contract declared upon is not the contract made, the findings thus assailed do not support the judgment, then, manifestly, the cross-complaint does not, and never did, state a cause of action, since, as we have seen, the findings so attacked are substantially in the language of that pleading.

Replying to the propositions thus submitted by the appellants, the defendant first contends that the precise question whether the facts alleged in the cross-complaint state a cause of action or are such as to entitle him to the specific performance of the alleged agreement of sale and purchase, was involved in and decided, adversely to the position of the appellants here, on the appeals in the case of these plaintiffs against the defendant, 153 Cal. 735, [15 Ann. Cas. 630, 21 L. R. A., N. S., 800, 96 Pac. 893], and 147 Cal. 249, [81 Pac. 958], and that, therefore, regardless of whether the court was right or wrong in its construction of the scope and effect of the allegations of the cross-complaint and of the findings referred to, the question of the sufficiency of that pleading is now inhumed beneath the doctrine of *res adjudicata*, and that said question is, consequently, so far as this action is concerned, no longer open to review.

It is secondly contended that there is nothing either in the language of the written option, the findings or the allegations of the cross-complaint which furnishes the slightest pretext for the contention that the building of the railroad referred to from Ukiah to Willits or over any other route constituted the consideration or any part thereof inducing the plaintiffs to

grant the option or was intended to operate as a condition precedent to the right of the defendant to exercise the option to purchase the lands, or that indicated a different contract from that upon which the defendant declares. As to the latter proposition, the defendant submits that, the plaintiffs themselves having by their own acts changed the condition of the property during the life of the option so that full performance of the agreement on their part could not be had, the defendant was entitled to part performance thereof or performance of so much of the agreement as it was within the power of the plaintiffs to consummate, with compensation for the deficiency. (Civ. Code, sec. 3386.) In other words, the contention is that the acceptance of the option by the defendant was an acceptance of the original offer, precisely as it was granted, subject, however, to the latter's right to be compensated by the plaintiffs for a deterioration in the value of the lands occasioned by their own unauthorized acts while the option still subsisted.

It may be just as well to announce, *in limine*, that our conclusion is that the attack upon the cross-complaint and the findings, as indicated in the foregoing, is without substantial grounds for its justification.

We shall consider the points urged in the order in which they are stated herein and as if both involved, as the first point certainly does, a direct assault upon the sufficiency of the cross-complaint to state a cause of action.

As seen, the cross-complaint avers the execution of the agreement of option, as set out in the complaint, granting to the defendant the exclusive right, for a period of twelve months, to purchase the property therein described. The pleading then proceeds with the following allegations, which constitute the sole fulcrum of the argument addressed to the proposition that the building of the railroad was intended as and was an act prerequisite to the right of the defendant to a conveyance:

"IV. That in the making of said agreement this defendant was not acting in his own interest and behalf, but for others associated with him, who were to construct the railroad hereinafter mentioned, and as to the interest of said persons, although made and taken solely in the name of this defendant, as party of the second part.

"V. That at the time said agreement and contract was made, this defendant, and the persons so associated with him, were contemplating and preparing for the building of a railroad from some point on the line of the railway of the San Francisco and North Pacific Railway Company into some portion of Mendocino county, in which timber and wood could be procured in large quantities; that at said time four different locations (or routes) for said proposed railroad were under consideration by them, and it had been determined by them to so build said railroad at some one of the said contemplated locations only, but it had not been decided at which one; that one of the said contemplated locations for said proposed railroad was from Ukiah, northerly to Willits in said county; that the building of said railroad at the last-mentioned location would greatly increase the value of the lands hereinbefore described by making the timber thereon accessible to a market; but the building thereof at any one of the other proposed and contemplated locations would not increase the value of these lands; that the selection of a route or location depended largely upon securing options upon timber lands along the line of the proposed railway; that all these facts were well known at the time to plaintiffs, and that the inducements and consideration moving the plaintiffs, and causing them to enter into said contract or agreement was the encouragement and inducement of the building of said railroad from Ukiah to Willits in preference over said other routes.

"VI. That thereupon and thereafter this defendant, and the persons so associated with him, secured the selection of said route and location for said railroad from Ukiah to Willits in preference to said other routes and locations; and said railroad was thereupon surveyed and laid out and is now in process of construction and being rapidly built and pushed toward completion, and will be built from Ukiah to Willits within a short time; and that the consideration and inducement causing preference to be given to said location thereof was the option given in said contract hereinbefore set forth, giving this defendant the privilege of purchasing said land, and similar options in similar contracts regarding other lands adjacent thereto and in that portion of the county, and said options were all taken and said contracts all entered into

solely for the purpose of securing freight for said railroad, and the added valuation that would be given to said lands by the construction of the railroad in excess of the price set in said contracts respectively."

In vain have we prosecuted an examination of the foregoing paragraphs of the cross-complaint to find a single line, or even a word, which may rationally be interpreted to justify the inference that the actual building of the railroad constituted any part of the consideration moving the plaintiffs to grant the option in question to the defendant. Much less do the averments disclose a direct statement indicating the act of actually building the railroad to have been imposed as a condition precedent to the defendant's right to a conveyance. The nearest approach to an allegation justifying the contention of the plaintiffs in that regard is the following: "That all the facts were well known at the time to plaintiffs, and that the inducements and consideration moving the plaintiffs and causing them to enter into said contract or agreement was the *encouragement and inducement of the building of said railroad* from Ukiah to Willits in preference over said other routes." But this allegation, it is plainly apparent, does not say that the defendant *agreed* to build the railroad, in consideration for the option, or that it would complete its construction within any specified time, but merely declares that the plaintiffs, to *encourage* and *induce* the projectors to build the road over said route, were thus moved to enter into the agreement. There is, in fine, nothing in the language of the cross-complaint binding the defendant to do anything with respect to the building and completion of said railroad, or indicating that upon the building and completion of the road rested the right of the defendant to exercise the option to purchase the property.

But we think that this question—the objection to the cross-complaint upon general grounds—has been definitively and conclusively determined by the supreme court in the case of *McCowen v. Pew*, 153 Cal. 735, [15 Ann. Cas. 630, 21 L. R. A., N. S., 800, 96 Pac. 893]—the second appeal in this case.

The question on the sufficiency of the cross-complaint on that appeal arose over the ruling by the trial court by which it sustained an objection by plaintiffs to any evidence being received in support of the averments of that pleading on the

ground that it did not state facts sufficient to constitute a cause of action or defense to the action of plaintiffs.

The sole proposition on which the asserted insufficiency of the cross-complaint was predicated at that trial of the case was, as stated by the supreme court, in its opinion, "that the contract sought under that pleading to be specifically enforced was contrary to public policy and void." That this was the specific ground of attack on the cross-complaint in that case was assumed by the supreme court from the fact only that the briefs and arguments of counsel for the appellants were confined to a discussion of the question whether, as they claimed the cross-complaint revealed to be the fact, "contracts between a land owner and a company for the establishment of the line of road to subserve and promote private and pecuniary advantages of those entering into them are in contravention of such (public) policy and void, because the tendency of all such contracts is to sacrifice the public interest to the selfish private advantage of the contracting parties." In other words, the specific ground upon which it was contended and argued at the hearing of that appeal, on behalf of appellants, that the cross-complaint failed to state a cause of action, was that the allegations of said pleading disclosed that the agreement between the plaintiffs and the defendant was of the nature of one whereby the defendant, acting for the railroad company, agreed with the plaintiffs to preclude said company "from establishing or locating depots or stations on its road at any other than certain localities, or within certain prescribed limits." And this question the court decided in that case, among other things saying that such agreements "are plainly in violation of a clear duty owed by the railroad company to the public, as public agents, to locate their depots and stations where the public wants and necessities demand their establishment," etc.

While it is true that the precise special reason urged in support of the general objection to the cross-complaint at the hearing of that appeal in this case was different from the precise special reason urged in support of the general objection to the pleading here, it is the statement only of an obvious proposition to say that the ultimate question submitted for decision by the court on the former appeal is precisely the same as the ultimate question submitted for determination

here, viz.: Does the cross-complaint state facts sufficient to constitute a cause of action? Nor, if it may be said that, strictly speaking, the court on the former appeal did not expressly pass upon the specific objection here urged in support of the general objection then interposed and argued against the cross-complaint, can it be maintained that the court did not then decide that that pleading was good as against an objection on general grounds for any reason that might be assigned in support of such objection. The objection to the reception of evidence in support of the allegations of the cross-complaint upon the ground that it failed to state a cause of action was, manifestly, tantamount to an objection thereto upon the same ground through the agency of a general demurrer. It often happens that more than a single reason may be assigned and urged in support of the general objection, in whatsoever form the objection may be raised, that a pleading is bad for paucity of facts. Indeed, the case at bar is a striking illustration of this proposition. And, where a pleading is challenged for want of sufficient facts, in whatever form such attack may be garbed, we apprehend it to be the duty of a court of review, and a duty that it will in all cases execute, in the examination of such objection, to take such pleading up by the four corners, thus scrutinize and measure its averments by the full breadth of the objection thus interposed to it, and then decide whether, for the reason or reasons advanced, or for other reasons, not advanced, the general objection that the pleading fails to state a cause of action is well taken. If this were not true, a piece-meal method of attacking a pleading for insufficiency of facts would obtain—a practice which the law does not countenance and which the courts, for the sake of putting an end to litigation, should not encourage. Therefore, we affirm that the supreme court, having sent the cause back for retrial after a decision against the objection that the cross-complaint here was bad for want of facts, has impliedly, if not expressly, held that the specific objection here urged against said pleading is groundless.

But we think that it cannot for a moment be doubted that, in its opinion in 153 Cal. 735, [15 Ann. Cas. 630, 21 L. R. A., N. S., 800, 96 Pac. 893], in this case, the court has passed upon and sustained the ability of the cross-complaint to withstand the specific attack made upon it here.

In order to determine the question whether the specific point urged in support of the objection made to the cross-complaint on the second appeal (153 Cal. 735, [15 Ann. Cas. 630, 21 L. R. A., N. S., 800, 96 Pac. 893]), on the ground that it set forth no cause of action, viz., that its averments disclosed an illegal and, therefore, void agreement as the basis of the relief asked for therein, the supreme court was, in the very nature of the proposition before it, compelled to examine the allegations of said pleading to satisfy itself upon the proposition whether the agreement between the plaintiffs and the defendant came within that class of agreements unlawful and void because in contravention of public policy. In the prosecution of this inquiry, the first proposition that would naturally be examined and solved was whether the cross-complaint, in point of fact, disclosed an agreement of any character whatsoever requiring the railroad to be built before the defendant would become entitled to a conveyance. And the court decided this question in the very beginning, holding, in as clear and explicit language as could well be employed, that the averments of the cross-complaint did not show that the plaintiffs were moved in granting the option by the consideration or promise that the defendant, before being entitled to accept such option, would build the railroad over the line from Ukiah to Willits, or that the defendant bound himself to do anything with regard to the location of the route or the building of the railroad. After stating the proposition upon which the appellants based their contention that the cross-complaint was insufficient to entitle the defendant to the relief demanded by his pleading, and saying that "the only question necessary for consideration is the refusal of the trial court to permit the introduction of any evidence by appellant in support of his cross-complaint," the court, *inter alia*, said:

"We make no question about the rule as contended for by the respondents, but we are satisfied, taking the allegations of the cross-complaint with the other pleadings in the case, which must be considered for that purpose (although it was on the allegations of the cross-complaint alone that the point of invalidity was based) that it does not appear therefrom that in the granting of the option any restriction or limitation was imposed thereby on Pew and his associates, who contemplated building the railroad, as to the selection of a route. . . . As to

the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that they were made by the cross-complaint as a foundation for a claim for special damages for the cutting of the timber during the life of the option, *and for no other purpose* (*McCowen v. Pew*, 147 Cal. 299, [81 Pac. 958]), while the answer to the cross-complaint denies that any such consideration entered at all. . . . The agreement itself granting the option . . . provides for an option in favor of respondent Pew to purchase the eleven hundred and sixty acres of timber land at \$15 an acre, and recites that the owners [McCowens] 'desired to dispose of same and to have the assistance of said party of the second part [Pew] in so doing without cost to the parties of the first part,' and declares the consideration for the option to be 'for value received, . . . and to induce said party of the second part to undertake the disposition of said land.' On the part of Pew he stipulated 'to use his best endeavors to dispose of said property, either by acquiring same or selling same to others' without cost to the McCowens. These are the only provisions of the contract of option itself. There is nothing therein relative to any conditions or stipulations or restrictions as to any route for a contemplated railroad, nor mention made of any railroad at all. Neither, when we come to an examination of the allegations of the cross-complaint, do we find anything *from which it appears that any agreement was made that in consideration of the granting of the option the selection of any particular route was provided for.* [Italics ours.] . . . It will be observed that there is nowhere in these allegations any statement that Pew and his associates agreed to select any particular route to the exclusion of any other route, *nor, in fact, so far as said allegations are concerned, does it appear therefrom that they undertook to do anything.* [Italics ours.] . . . All that appears is that Pew and his associates, for the purpose of securing freight for the railroad they contemplated building, took options upon timber lands in the locality through which the line of said road might be built and such freight received; that certain owners of land, *as an inducement to the building of the railroad over one of the four contemplated routes*, gave an option upon their lands at a price specified in the option representing the full value of the land and that the only advantage to be secured to the builders

of the road (as full value for the land was to be paid) was the obtaining of freight to be carried. . . . In the absence of anything to the contrary in the allegations of the cross-complaint, it must be taken that Pew and his associates were persons contemplating the formation of a railroad corporation, and that the options obtained by Pew were for the benefit of such corporation, and that any inducements operating upon the granting of such options must be taken to have extended to the contemplated railroad itself."

Thus we have quoted *in extenso* from the opinion of the supreme court to show, as the opinion clearly does show, that the very question involved in the present discussion was decided in said opinion by that court, viz., whether the cross-complaint discloses that the consideration or a part of the consideration moving the plaintiffs to grant the option in question to the defendant was a promise or agreement on the part of the latter to secure the location of the route or the building of the railroad from Ukiah to Willits. Disregarding, if we may choose to do so, all the other language of the opinion but the following, and we find the proposition succinctly and conclusively decided: "As to the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that *they were made by the cross-complainant as a foundation for a claim for special damages for the cutting of the timber during the life of the option, and for no other purpose,*" and that "it will be observed that there is nowhere in these allegations any statement that Pew and his associates agreed to select any particular route to the exclusion of any other route, *nor, in fact, as far as said allegations are concerned, does it appear that they undertook to do anything.*"

If, by the foregoing, the court does not expressly decide that the specific objection here made to the cross-complaint is without merit, then we confess our inability to understand the above language or the import of the decision.

Our conclusion upon the point under consideration is, as must be apparent from what we have said: 1. That nowhere in the cross-complaint is there a single statement or averment which may be held to disclose an agreement that the road should first be built before the defendant's right to a conveyance ripened. There is even not shown, as the supreme court declares, an agreement to locate the road over the route from

Ukiah to Willits, much less an agreement that the road should be built before the defendant would be authorized to exercise his option. 2. That, assuming that our conclusion as thus stated is erroneous, the decision of the supreme court to which we have referred, holding the objection to the cross-complaint on the general ground that it does not state a cause of action not to be good involves the law of the case upon that question and is conclusive as to the parties to this action. And since the findings upon this point follow the averments of the complaint, it therefore follows that the court did not, as is the contention, find that the building of the railroad constituted a prerequisite to the right of the defendant to a conveyance.

What we have said with regard to the law of the case, applies with equal pertinency and force to the second point advanced by the appellants.

The proposition is, as we have seen, that the findings disclose a variance, fatal to the judgment, between the option granted by the plaintiffs and the acceptance by the defendant. The finding in this particular, as we have heretofore shown, substantially follows the averments of the cross-complaint. As before suggested, if that finding does not support the judgment for the reason stated, then clearly the cross-complaint has at no time stated a cause of action. The point thus made is, therefore, in effect an attack upon the sufficiency of the cross-complaint to state a cause of action. Although it is strictly correct to say that this precise point was not raised or considered on the second appeal of this case (153 Cal. 735, [15 Ann. Cas. 630, 21 L. R. A., N. S., 800, 96 Pac. 893]), yet we adhere to what we have already said regarding the effect of that decision upon the question of the sufficiency of the cross-complaint, and hold that thereby that pleading was held to be good as against that objection for any reason that might or *could* have been suggested in its support. The court, as before stated, remanded the cause for a *new trial*. Upon what, must we assume? Upon a pleading which, for any reason, stated no cause of action? The questions embrace their own answer. But conceding that there was no implied ruling against the contention of the appellants as to the point now under review in the opinion in the 153 Cal., still there can be left no room for any doubt, after an examination of the opinion in *McCowen v. Pew*, 147 Cal. 309, [81 Pac. 958], *supra* (the first appeal in

this case), that this point was presented and argued by counsel and decided by the court adversely to the contention of the appellants here.

The cause, on said appeal, was first heard in department and the judgment and order in favor of the defendant affirmed. In the department opinion it is said: "One of the contentions on the part of the appellants is, as stated by their counsel, 'that the option in this case was merely an offer to sell the property, and that in order to make it a valid contract, capable of specific performance, it was necessary for the defendant Pew, within the time set in the option and before its withdrawal, to accept the offer in the *exact terms in which it was made*. . . . An acceptance of an offer to purchase the property must be unconditional in order to create a contract, and the slightest condition attached to an attempted acceptance of the option prevents an agreement of the parties.' This contention cannot be maintained"; citing *Burks v. Davies*, 85 Cal. 110, [20 Am. St. Rep. 213, 24 Pac. 613].

The court in bank reversed the department on one point and so sent the cause back for retrial. The single point upon which the reversal was founded was, as we have before shown, that the trial court erred in its adoption of a basis for the admeasurement of compensation to which the defendant claimed to be entitled because of the removal of the timber from the lands. The question now under consideration was not discussed by the court in its opinion rendered in bank, but it was before the court then as it was before the department. Indeed, it was one of the prominent points urged for a reversal at the hearing of that appeal, and the judgment and order having been reversed on another point, without any reference in the opinion to this point, it must be assumed that the court regarded it as possessing no merit, which is equivalent to saying that the court's decision of the question was against the position here of appellants.

But apart from any consideration of the proposition whether the decisions of the supreme court heretofore rendered in this case constitute the law of the case upon this question, we are persuaded that the position of the appellants, as a legal proposition, is altogether untenable.

As has appeared, the plaintiffs granted to the defendant the option to purchase, within twelve months, the lands in dis-

pute. During the life of the option, the plaintiffs cut and removed a large quantity of timber from said lands and thus, by their own acts, changed the condition of the property from that in which they agreed to permit the defendant to buy it, if he so elected within the time granted to him. Within that time, the defendant did elect to exercise his right to purchase the property, according to the terms of the option, and in writing so notified the plaintiffs, but, having been informed of the destruction and removal of a large quantity of timber from said lands after the granting of said option, he demanded of the latter compensation therefor commensurate with the depreciation in value that the property had necessarily suffered thereby. The plaintiffs, as we have seen, acquiesced in the acceptance as it was thus made by the defendant. In other words, as the court found, the "plaintiffs made no objection to the notice of acceptance of option, as so given by defendant, or to his offer to perform on his part, and that they had opportunity so to do if any objections they had; and they did forthwith assent and agree to the same and to all propositions made by defendant in said writing." And thus the plaintiffs distinctly recognized the acceptance thus made by the defendant as an acceptance of the identical option which they had granted to him. And, obviously, such acceptance *was* of the precise offer by the plaintiffs. The option provided that the plaintiffs would grant the defendant the right to purchase, within twelve months, eleven hundred and sixty acres of land, specifically described in said offer, at the rate of \$15 per acre, and the acceptance declared that the defendant would accept the offer and purchase said *eleven hundred and sixty acres, so described, at the rate of \$15 per acre*. Up to this point, it would and could not be doubted that a court of equity would compel specific performance on the part of either of the parties to this contract. But it transpires that the plaintiffs—the owners of the lands and the optioners—through their own deliberate and unauthorized acts, find themselves unable to perform their agreement in full. By their own acts during the life of the option they have lessened the value of the lands which they agreed to allow the defendant to buy at a specified price. Willing for and desirous of a performance of so much of the agreement as the optioners were able to carry out, the optionee added to his acceptance: "You have

despoiled the property which you granted me the option to purchase of some of its valuable timber, which was my chief inducement to the securing of said option, and thus have you reduced the value of the lands. Now, I think it is only just and right that, having elected to buy the property on the stipulated terms, I should be compensated for the value of that timber," to which proposition the plaintiffs assented, and thus, it is argued, a conditional contract or a new agreement, entirely independent of and distinct from the proposition involved in the original negotiations has been introduced and is relied upon by the defendant. Obviously, the inevitable result of this contention, if sustained, would be, to employ an illustration: That A may agree to grant to B an option to buy his house and lot at a specified price within a specified time. A may get rid of the obligation thus imposed upon himself, or, as might in effect strictly be true, arbitrarily rescind or withdraw the option by wrongfully removing the house from the lot during the life of such option and before it had been accepted.

The proposition as thus stated and contended for cannot be upheld. B, it is very true, might justify a refusal on his part, after acceptance, if he accepted the option with no knowledge of the changed condition of the property through the optioner's own fraud, to take the property; but the optioner certainly could not, upon any equitable consideration, refuse to convey upon acceptance by the optionee, with just and proper compensation to the latter for the part of the agreement which he was thus made unable to perform.

In other words, the case here comes clearly within the rule of part performance with compensation for the deficiency as enunciated by section 3386 of the Civil Code, *supra*, which reads: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compelled specifically to perform, everything to which the former is entitled under the same obligation, either completely or *nearly so, together with full compensation for any want of entire performance.*"

The rule is thus stated by Professor Pomeroy, in his work on Equity Jurisprudence, volume 6, section 831: "Where the vendor is unable even substantially to perform his contract, the vendee, at his election, may have specific performance with

compensation for the deficiency, on the principle that 'where one party would be foiled at law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted.' "

The cases cited by appellants—notably, *Clarke v. Burr*, 85 Wis. 649, [55 N. W. 401], and *Caldwell v. Frazier*, 65 Kan. 24, [68 Pac. 1076]—deal with a widely different state of facts from that in the case at bar, and are, therefore, not in point here.

In the first-mentioned case, Clarke granted to Burr an option to purchase a certain piece of land, upon which a sawmill stood. At the time the option was given, the sawmill was insured for \$9,500. The mill was destroyed by fire during the life of the option and thereafter Burr, within the time designated by the option, notified Clarke of his acceptance of the offer to sell, but demanded that the insurance money be credited to him as a part of the purchase price—that is, that he (Burr) was ready to buy the property for a price amounting to the difference between the sum originally agreed upon and the amount of the insurance on the mill. The court held that the "acceptance" by Burr was not an unconditional acceptance, and therefore constituted the proposal of a different contract from that contemplated by the option, and refused to decree specific performance of the alleged contract.

The case of *Caldwell v. Frazier*, 65 Kan. 24, [68 Pac. 1076], is quite similar as to the essential facts upon which the decision of the controversy hinged to the case of *Clarke v. Burr*, 85 Wis. 649, [55 N. W. 401].

There are several conclusive answers to the contention, pressed with vigor, that these cases are applicable to the case at bar. First, it is to be observed, as we have shown, that there was here no conditional acceptance of the offer. The defendant, in other words, did not accept the offer upon the condition that the price stipulated in the option be reduced, but accepted the offer for the precise price at which the plaintiffs therein offered to sell the lands. The demand for an allowance for the inability of plaintiffs to fully complete the contract to convey arising upon the acceptance of the offer was not, manifestly, a proposition to reduce the *price* for which they offered the lands, but for *compensation* for the loss which would accrue to the defendant because it became

impossible for plaintiffs to convey to the defendant all that they had offered to convey for the stipulated price. Secondly, the plaintiffs expressly acquiesced in the acceptance, and treated and recognized said acceptance as of the precise option which they had granted to the defendant, and thus they waived any objection to the acceptance upon the ground that it varied from the terms of the option. (Civ. Code, sec. 1501; Code Civ. Proc., sec. 2076; *Oakland Bank of Sav. v. Applegarth*, 67 Cal. 86, 88, [7 Pac. 139, 476]; *In re Pearsons*, 102 Cal. 569, [36 Pac. 934]; *Royal v. Dennison*, 109 Cal. 558, [42 Pac. 39]; *Kofoed v. Gordon*, 122 Cal. 314, [54 Pac. 1115]; *Lattimer v. Capay Valley L. Co.*, 137 Cal. 286, [70 Pac. 82].) Thirdly, and, indeed, the most important of the considerations distinctly differentiating this case from those cited and referred to, the changed condition of the property, as we have seen, was due entirely and solely to the deliberate and unauthorized acts of the plaintiffs themselves during the life of the option, and it is a familiar principle that no one will be permitted to take advantage of his own wrong. As is shown by the illustration above employed, a party will not be permitted arbitrarily, or at his own will, or by his own acts, or without the consent of the other party thereto, to render his contract nugatory. An option agreement, although in its nature unilateral, is as binding upon the part of the optioner as is a bilateral agreement upon the parties thereto. So long as it is supported by a consideration, the optioner can no more capriciously withdraw or rescind it than one of the parties could arbitrarily or without the consent of the other party rescind a bilateral contract.

And this brings us to a consideration of the only one of the several remaining points to which we feel called upon to give special attention in this opinion, viz.: That the option was not supported by a consideration. The obvious answer to this proposition is that the option as an *option agreement* became *functus officio* at the moment of its acceptance by the defendant. After that event, in other words, it was eliminated from the transaction as an *option*, and could then serve no purpose except in so far as it disclosed and involved the terms of the bilateral agreement arising, *ipso facto*, upon its acceptance, and, therefore, whether it was supported by a consideration is now immaterial. If, as a matter of fact, it was unsup-

ported by a consideration (although the court found to the contrary), it was, of course, then a mere *nudum pactum*, and the plaintiffs could, therefore, have withdrawn it at any time before its acceptance. (*Brown v. San Francisco Sav. Union*, 134 Cal. 448, 452, [66 Pac. 592], and cases therein cited; *Mitchell v. Gray*, 8 Cal. App. 423, 429, [97 Pac. 160].) But, while this is true, the plaintiffs not having withdrawn it but, on the contrary, treated it as a binding obligation by acquiescing in its acceptance, it was good without a consideration until so withdrawn.

We have now examined the record before us and the points pressed upon us for a reversal with much care and have thus found no reason which would warrant us in disturbing the judgment.

The defendant having appealed from that portion of the judgment allowing the plaintiff's interest on the amount adjudged to be due them for the property in dispute, which said appeal, No. 882, is pending in this court, the judgment appealed from in the case at bar, except that portion relating to such interest, and the order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 20, 1912.

[Civ. No. 867. Second Appellate District.—February 23, 1912.]

TITLE INSURANCE AND TRUST COMPANY, a Corporation, Respondent, v. F. B. WILLIAMSON, E. S. WILLIAMS, Trustee in Bankruptcy of F. B. WILLIAMSON et al., Defendants-Respondents; CARPENTER AND BILES MILL AND LUMBER COMPANY, Cross-complainant-Respondent, and SAN PEDRO LUMBER CO., Cross-complainant-Appellant.

BUILDING CONTRACT—ASSIGNMENT BY CONTRACTOR OF BALANCE DUE FROM OWNER TO MATERIALMAN—ORDER UPON FUND TO AGENT OF OWNER—SUBSEQUENT LEVY OF EXECUTION.—An assignment made by a building contractor of the whole balance due to him under the contract with the owner, in favor of a mill and lumber com-

pany to which the contractor was indebted for the full amount of such balance, in whose favor an order given was addressed to the owner's agent having custody of such balance, takes precedence over a subsequent levy made upon such balance at the instance of a judgment creditor of the contractor.

ID.—RIGHT OF ASSIGNMENT OF BALANCE DUE—GENERAL RULE.—The contractor had the right to assign the whole balance of the indebtedness due to him from the owners of the building although he could not divide that balance into fractional amounts and make an assignment of the same. It is a general rule that a creditor can only make an assignment of the full amount due, and cannot, without the express consent of the debtor, make partial assignments to divers persons. The whole debt due the contractor was the subject of assignment without consent of the owners of the property.

ID.—ASSIGNMENT EFFECTED PRIOR TO LEVY.—Where the assignment was effected prior to the levy of the execution, it left the plaintiff, as disbursing agent for the owner, without any money in his hands belonging to the contractor to which the subsequent levy of the execution against the contractor could attach. It being clear from the circumstances surrounding the transaction that, if the money had been paid over to the assignee, the execution creditor could not have reached it, the prior effected assignment of the whole debt has the same result.

ID.—EQUITABLE ASSIGNMENT OF DEBT.—In order to constitute an equitable assignment of a debt, no express words to that effect are necessary; but if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.

ID.—ORDER GIVEN TO AGENT OF OWNERS.—It was not material that the order was addressed to the agent of the owners, instead of to the owners themselves with whom the building contract was made, where such agent was duly authorized to hold the fund and to make payments therefrom upon the contract price to the contractor.

ID.—ASSIGNMENT NOT DEPENDENT UPON NOTICE TO DEBTOR—INTENTION OF ASSIGNOR AND ASSIGNEE.—The question as to whether the assignment was in fact made is not dependent upon the question of notice to the debtor, but upon the intention of the alleged assignor and assignee.

ID.—OPINION ON PETITION FOR REHEARING IN BANK—QUESTION OF NOTICE TO DEBTOR—UNNECESSARY OPINION—NOTICE TO AGENT SUFFICIENT.—It is held by the Supreme Court, on petition for rehearing, unnecessary to say that the assignment to the Carpenter and Biles Mill and Lumber Company would be good against a levy made upon the fund after the assignment and before notice to the

debtors, the Dunhams. But if such notice to the debtor was necessary to make the assignment good against a subsequent levy, the notice given to plaintiff, who was the trustee and agent of the Dunhams, to pay the debt to the contractor, or to his assignee, as the case might be, was a sufficient notice to the debtor.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

O'Melveny, Stevens & Millikin, and E. B. Coil, for Appellant.

Sheldon Borden, and George H. Moore, for Carpenter and Biles Mill and Lumber Company, Respondent.

JAMES, J.—The defendant San Pedro Lumber Company, a corporation, appeals from the judgment entered in this action, and from an order denying its motion for a new trial. In the year 1907, defendant Williamson, as contractor, erected a house for S. H. Dunham and wife. The contract price was to be paid in installments and the amount in money was deposited with the plaintiff corporation, which was instructed to act as the agent of the Dunhams in the distribution thereof. Such amount of money as might be in the hands of the agent of the Dunhams upon the completion of the house was to be retained for a period of thirty-five days after notice of completion had been filed, at the expiration of which time, if no liens were filed against the structure, plaintiff was directed to pay over the remaining balance of the money to the contractor Williamson. Notice of completion of the building was filed on or about the first day of November, 1907, and there then remained in the hands of plaintiff, and which it was required to pay over to Williamson in the event no liens were filed, the sum of \$450. Williamson was then indebted to respondent Carpenter and Biles Mill and Lumber Company in a sum of money exceeding \$450 for material furnished, a portion of which, at least, was used in constructing the Dunham house. He made a written order upon the plaintiff to pay the amount of the last payment provided to be paid to him, to the Carpenter and Biles company. This order was presented to

plaintiff and the bearer was told, at the office of the former, that the order should be signed by the Dunhams. The order was taken away and was not returned until the eleventh day of December thereafter. The thirty-five days ensuing subsequent to the filing of notice of the completion of the building expired on the ninth day of December, 1907. On the tenth day of December, 1907, one day before the order of the Carpenter and Biles company was returned to plaintiff, appellant, which was then a judgment creditor of the contractor Williamson in an amount in excess of \$300, caused a levy to be made under a writ of execution against the interest of Williamson in the fund of money held by plaintiff. These conflicting claims having arisen affecting the \$450 held by it, the plaintiff brought this action in order to have it determined which of the defendants was entitled to the money. The trial court held that the order given to the Carpenter and Biles company, having been executed and delivered prior to the date of the levy made under the writ of execution, an assignment of the debt was worked thereby, and gave judgment in favor of the respondent last named. On this appeal the only parties in contest are the appellant and respondent Carpenter and Biles Mill and Lumber Company. It is contended on behalf of appellant that the order given by Williamson did not operate as an assignment of the fund, nor change title thereto in any respect, and that at the time attachment thereof was attempted to be made under the execution, Williamson was the owner of the money or credit, and that appellant by the service of the process mentioned acquired a right to have the money paid over for its benefit. At the time the order was given the building had been fully completed; Williamson as contractor had earned the right to have paid to him the full amount of the contract price, and he was then entitled to receive it all, except that payment was to be withheld for thirty-five days after notice of completion was filed, in order that the time within which liens might be perfected against the property of the Dunhams should have expired. The debt, therefore, to our minds, was one which was the subject of assignment, and that, too, without the consent of the Dunhams. Williamson had the right to assign the whole of the balance of indebtedness due to him from the Dunhams, although he could not have divided that balance into fractional amounts and make

an assignment of the same in such a manner. It is a general rule of contracts that the benefits thereof, where they do not involve the expenditure of personal effort or services, are the subject of assignment without the consent of the debtor being first obtained; with the reservation, however, that the creditor in such a case cannot, without the consent of his debtor, require by assignment payment to be made to divers persons; in other words, the assignment in such case must be made of the full amount due. The purported assignment in this case answers fully these requirements, and if it sufficiently appears from the writing and in testimony that the intention was of Williamson at the time he executed the order to transfer all right to the \$450 to respondent Carpenter and Biles company, then this assignment, having been made on a day prior to the time when levy was attempted to be made under appellant's execution, left the plaintiff without any money in its hands belonging to Williamson to which appellant's levy might attach. The following decisions are in point: *Curtner v. Lyndon*, 128 Cal. 35, [60 Pac. 462]; and the general subject, with digest of various cases, as found in *Donohoe-Kelly Banking Co. v. Southern Pacific Co. et al.*, 138 Cal. 183, [94 Am. St. Rep. 28, 71 Pac. 93]. It cannot be said from the testimony as it is set out in the bill of exceptions that it was not the intent of Williamson and the Carpenter and Biles company that an assignment should be made of the \$450 at the time the order was executed. Williamson testified in effect that his intention was to transfer his right and title to the money, and the Carpenter and Biles company at all times insisted that they were entitled to it. It is very clear from the circumstances surrounding the transaction that had the money been paid over to the Carpenter and Biles company, Williamson would have had no legal right to demand that the same be delivered by that company to him, or diverted in any way from its possession. As it was said in *McIntyre v. Hauser*, 131 Cal. 11, [63 Pac. 69]: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." (See, also, *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 41, [38 Pac. 517].) As we view the case,

it is not material that the order was addressed to the plaintiff instead of to the Dunhams, with whom the building contract was made. The plaintiff was the duly authorized agent of the Dunhams for the purpose of holding the fund and making payment of the contract price to Williamson, and we can see no good reason why an order addressed to an executive agent, as this plaintiff was, should not be sufficient and binding. Aside from this, as to whether the assignment was in fact made or not, as has been before noted, depended, not upon the question of notice to the debtor, but upon the intention of the alleged assignor and assignee. No questions are here involved as to any damage resulting to a debtor who has paid his debt without notice of assignment made by his creditor.

Upon the record as it is shown, we are of opinion that the findings made by the trial court must be sustained.

The judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 23, 1912, and the following opinion then rendered thereon:

THE COURT.—The petition to transfer this cause to the supreme court for rehearing is denied.

We do not think it was necessary to say, as intimated by the district court of appeal, that the assignment to the Carpenter and Biles company would be good against a levy made upon the fund after the assignment and before notice thereof to the debtors, the Dunhams. But if such notice to the debtors was necessary to make the assignment good against a subsequent execution levy or attachment levy, the notice given to the plaintiff, who was the trustee and holder of the fund and agent of the Dunhams to pay it to Williamson or to his assignee, as the case might be, was a sufficient notice to the debtor, and operated to perfect the transfer of the title to the fund.

[Civ. No. 897. Third Appellate District (First District No. 974).—
February 23, 1912.]

MARY A DEMING and CLARA J. DEMING, Respondents.
v. LOUIS MAAS et al., Defendants; JOSEPH HERR-
SCHER, Appellant.

**LEASE—ACTION ON BOND FOR RENT—SIGNATURE AS PARTNERSHIP—
MODIFICATION OF RENT IN CORPORATE NAME—PERSONAL LIABILITY
—SUPPORT OF FINDING.**—In an action upon a lease for rent, and
upon a bond to secure unpaid rent, which was signed by appellant
as "Joseph Herrscher & Co.," which lease was subsequently modified
by consent of appellant to the reduction of rent, under the signa-
ture, "For Joseph Herrscher, Inc., Joseph Herrscher," it is held
the evidence in regard to such signature is sufficient to sustain a
finding that the appellant intended to and did bind himself per-
sonally to the obligations of the bond, and that he personally as-
sented to the modification of the lease, and that it was brought
about through his personal negotiations with plaintiffs.

ID.—SURPLUSAGE IN USE OF PARTNERSHIP NAME.—Where it appears
that the use of the partnership name was simply to designate the
mere style under which the appellant individually conducted his
own personal business, and that no other person was associated
with him therein, the words "& Co.," appended to his signature to
the bond, may be disregarded as surplusage, and the signature to
the bond so expressed bound the appellant individually to the
terms of the bond.

**ID.—USE OF CORPORATION NAME IN MODIFYING LEASE—PERSONAL CON-
TROL OF WHOLE STOCK—"CORPORATE DOUBLE" OF HIMSELF.**—Where
the corporation name used by appellant in securing the modification
of the lease included the use of appellant's own name, and was
signed by his own name for the corporation, and the evidence shows
that he had the personal control of all of its stock and held it all
in his own name, with the exception of five shares, one of which
was transferred to his bookkeeper and four others to members of his
own family, merely to qualify them as directors, it is held that,
under these circumstances, his subscription of the corporate name
to such modification was both the act of the corporation and his act
as an individual. He was, in such case, virtually the corporation
itself, which was his "corporate double."

ID.—EVIDENCE—PROPER ADMISSION OF DOCUMENTS.—The court, under
the legal effect of the evidence concerning the signatures to the bond
and to the written modification of rent, properly admitted each of
them in evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Jas. P. Sweeney, and Jos. P. Lucey, for Appellant.

Gavin McNab, and B. M. Aikins, for Respondents.

HART, J.—The plaintiffs brought this action against the defendants to recover the sum of \$525 for rent alleged to be due said plaintiffs.

The action was tried by the court, without a jury, and the plaintiffs were given judgment in the sum of \$575.31.

From said judgment and the order denying him a new trial, the defendant, Herrscher, prosecutes this appeal.

The action is founded on a certain bond, of which more hereafter.

It appears from the complaint that on or about the twenty-fifth day of March, 1907, by a written lease, bearing date March 23, 1907, the plaintiffs demised and delivered into the possession of the defendant, Mass, certain premises situated in the city of San Francisco, for a period of five years from the first day of April, 1907, at the total rent or sum of \$14,000, payable in advance in equal monthly payments. At the same time, and as a part of the same transaction, the defendant, Herrscher, executed and delivered to the plaintiffs a bond, "conditioned, among other things, upon the payment of all rents and sums of money as set forth in said lease."

On the eleventh day of December, 1907, the terms of the lease above mentioned were so modified as that the rent was reduced for the year beginning with the fifteenth day of December, 1907, to the total sum of \$2,100, etc. The complaint alleges that the defendant, Herrscher, assented to said alteration of said lease.

The bond referred to was signed and executed by Louis Maas and "Jos. Herrscher & Co."

The agreement modifying or altering the terms of the lease, as indicated, was subscribed and executed by the plaintiffs and "For Jos. Herrscher Co., Inc., Jos. Herrscher."

This action having been instituted against Jos. Herrscher, individually, the amended complaint thus explains the circumstances under which the appellant came to subscribe to the bond a name implying such subscription to be that of a partnership, and to the agreement, modifying the terms of the lease, signed a name implying that such subscription was that of a corporation:

“That said Joseph Herrscher subscribed the said bond in the form and manner following, to wit: ‘Jos. Herrscher & Co.’ and that the said signature ‘Jos. Herrscher & Co.’ was then and there the individual trade name, firm and style of said Joseph Herrscher, and was appropriated and used by him exclusively as such trade name, firm and style, and that he signed the said bond in the form and manner aforesaid with the intention of binding himself by such signature, and that it was mutually understood by and between the plaintiffs and the said Herrscher that he and he alone was intended to be designated by such trade name, firm and style, and that plaintiffs signed and delivered the said lease upon the faith of such mutual understanding; and that said Herrscher at the time of signing said bond well knew that plaintiffs so understood said signature by said Herrscher, and said Herrscher well knew at the time of the delivery of said lease that the plaintiffs delivered the said lease upon the faith of such mutual understanding.

“That ‘Jos. Herrscher Co., Inc.,’ is and at all times herein referred to was a corporation organized and existing under and by virtue of the laws of the state of California; and that said Herrscher at all of said times owned and held, and now owns and holds, the entire capital stock of said corporation, except five shares thereof, which said five shares are held in the names of the directors of such corporation as qualifying shares merely to qualify them holders thereof as directors of said corporation.”

The answer denies that “Joseph Herrscher & Co. was at any time the individual trade name, firm and style of said Joseph Herrscher or that he signed the said bond with the intention of binding himself by such signature,” and denies that Herrscher, “as surety, or otherwise, assented to the alteration in said lease.”

The court found that "said Joseph Herrscher subscribed the said bond in the form and manner following: 'Jos. Herrscher & Co.,' and that the said signature, 'Jos. Herrscher & Co.' was then and there the individual trade name, firm and style of said Joseph Herrscher, and was appropriated and used by him exclusively as such trade name, firm and style, and that he signed the said bond in the form and manner aforesaid with the intention of binding himself by such signature, and that it was mutually understood by and between the plaintiffs and the said Herrscher that he, and he alone, was intended to be designated by such trade name, firm and style, and that plaintiffs signed and delivered said lease upon the faith of such mutual understanding," etc. The court further found that the plaintiffs, at the express request of said Herrscher and without further consideration, agreed to and did reduce the rent reserved in said lease; that said Herrscher, by signing the writing noting the alteration in said lease, as follows: "For Jos. Herrscher Co., Inc., Jos. Herrscher," assented, as surety upon said bond, to the alteration in said lease; that "'Jos. Herrscher Co., Inc.,' is and at all times herein referred to was a corporation organized under and by virtue of the laws of the state of California, and that said Herrscher at all of said times owned and held, and now owns and holds, the entire capital stock of said corporation, except five shares thereof, which said five shares are held in the names of the directors of such corporation as qualifying shares, namely to qualify them holders thereof as directors of said corporation."

The contention is that the foregoing findings are not justified by the evidence. In other words, the appellant asserts: 1. That the evidence does not show that Herrscher intended to bind himself by said bond or that he did do so. 2. That if he did thus personally bind himself, there is no evidence which supports the finding that he assented to the modification of the lease, to secure the fulfillment of the terms of which the bond was given.

We are unable to agree with the appellant's contention. The evidence sufficiently supports the findings referred to.

The entire transaction seems, indeed, to have been one conducted and consummated between the appellant and the lessors. Maas, it would seem, was only nominally interested

in the lease. However that may be, the court was justified in finding from the evidence that Herrscher not only intended to bind himself personally by the bond but did do so, and later personally assented to a modification of the terms thereof by subscribing to the written instrument containing terms to that effect. And it is quite clear, from all the circumstances of the several transactions, that Earsman, the agent of plaintiffs, who conducted the negotiations on their behalf, was given to understand by Herrscher that his purpose was to bind himself personally as surety for the payment of the rent.

Earsman testified that he first heard of the appellant and not of Maas as the party desiring to lease the premises. He called upon Herrscher, talked with him about the property and the leasing thereof, and then accompanied him to the premises so that he (Herrscher) might inspect the same. Herrscher "was the only man I dealt with in renting this place to Maas," he testified. "I discussed the terms with Herrscher and agreed upon them. He was to be surety for the tenant, Louis Maas, who was an employee of his, and his name was used to fill in. I was told this by Herrscher and Maas. I told them before the execution of the lease and the bond that I would not lease the premises unless a bond was given. I gave the keys to Mr. Herrscher about the end of August." Earsman prepared the lease and the bond, and when he presented the last-mentioned document to Herrscher for his signature, the name of the surety being, so he testified, left blank in the body of the instrument, the latter instructed him to insert in said blank in said bond the name, "Jos. Herrscher & Co." The appellant at one time had a partner, but he told Earsman, at the time of the execution of the bond, that said partner had withdrawn from the firm. After the execution of the bond, Herrscher paid the balance of the rent, \$190, for the month of March, 1907, said rent being payable in advance.

The witness, Landis, bookkeeper for the Joseph Herrscher Company for five years up to the time of the trial, testified that said company (a corporation), consisted principally of the appellant. There were, he said, one thousand shares of stock in said company, and all those shares but five were owned by Herrscher. The witness himself and four others (mem-

bers of Herrscher's family) each owned a share, having acquired the same for the sole purpose of qualifying them as directors. "I recollect," he further testified, "Mr. Earsman bringing papers to Mr. Herrscher's, at Church and Market streets." He further stated that, "as bookkeeper for *Mr. Herrscher*, he received the rents from the building (on the premises in question) after they were collected and credited them on the books. Mr. Maas was in Mr. Herrscher's employ at that time as salesman."

Maas, the nominal lessee, testifying as a witness for appellant, declared: "I was an employee of Joseph Herrscher at that time [referring to the time of the making of the lease and bond]. I signed that document [the lease] at the request of Mr. Herrscher. . . . My interest at first was this: I negotiated for the lease with the consent that *Mr. Herrscher would go on my bonds*. I was not to have any interest in the premises more than my rental interest in it—that is, in subrenting the premises. I was not to receive anything from that in addition to my salary as working for Herrscher. I was to receive no share in the profits. . . . I never received any rents. Mr. Herrscher negotiated for the reduction of the original rent asked. . . . Mr. Herrscher was the one who decided the terms of the contract with regard to the amount of rent and with regard to everything I left it entirely to Mr. Herrscher."

The appellant testified that "there is a corporation in which I am interested, known as 'Jos. Herrscher & Co.'; that was in existence at the time this lease and bond were executed. *Nothing was said about the corporation going on the bond*. When the lease and bond were presented to me with the name 'Jos. Herrscher & Co.' written in, I called Mr. Earsman's attention to that fact. He said that the lease [bond?] was already made out 'Jos. Herrscher & Co.'—never mind—for me to sign exactly as he had written it out on top, which I did—signed it exactly as he told me to sign it. There was no such firm as Joseph Herrscher & Co. in existence."

The foregoing statement of the evidence, in substance, is, we think, sufficient to show that the court was justified in not only finding that the appellant intended to bind himself personally to the obligations of the bond, but that he did do so, and, further, that he not only personally assented to a modification of the terms of the lease, but that such alteration was

brought about solely through his own negotiations with plaintiffs.

If any doubt could arise from the testimony produced by plaintiffs upon the question whether appellant intended to and did personally bind himself on the bond, that doubt is certainly removed by his own admissions. He testified, as seen, that nothing was said about the corporation going on the bond and that there was no partnership known as "Jos. Herrscher & Co." in existence when the transaction took place. He signed the bond in the name of a partnership which had no existence, but in doing so signed his own name. The circumstances under which he subscribed that name to the bond clearly disclose his intention, for had he intended to thus bind the corporation and not himself in his individual capacity, he would undoubtedly have so announced, and refused to subscribe either his individual name or that of a partnership having no existence when the instrument was submitted to him for his signature and execution. At least this would have been the natural and sensible course of a sensible and honest business man having no intention of binding himself as an individual and who was acting in good faith in the transaction. Another circumstance of potent significance bearing upon the question of his intention is the fact, not disputed, that he was interested in the lease—indeed, if not in reality the sole lessee, he was a joint lessee with Maas. It is quite reasonable to suppose from this fact that he would be perfectly willing, and, in truth, intended to bind himself personally for the rent reserved in a lease in which he was more vitally interested than any other person, except, perhaps, the lessors. But the very fact itself that he signed the bond is sufficient to bind him, whatever may have been his intention, notwithstanding that, in signing the bond, he unnecessarily added the words "& Co." to his own name. If, as he testified, there was no partnership in existence by the name of "Joseph Herrscher & Co.," then the words thus added to his name as subscribed to the bond were superfluous and surplusage, are perfectly meaningless and without legal or any significance as so employed, and can, therefore, in no way operate to release him from personal liability on the bond.

Nor, under the evidence, can the plea that, because the instrument changing the terms of the lease was subscribed by

the appellant as "Jos. Herrscher Co., Inc.," be successfully set up in support of the position that he did not personally assent to such modification.

No one will dispute the very obvious proposition that a guarantor is released from liability by any material alteration of the terms of the contract guaranteed, where such alteration is made without his consent.

But we think that it appears very clearly from the evidence that Herrscher consented to the change in the terms of the lease involved here. In the first place, it is to be noted, in this connection, that the proof shows that Herrscher was himself, practically, the corporation. He owned all but five of the one thousand shares of stock for which the corporation was capitalized, and the shares thus otherwise owned had been given or transferred to the holders thereof for the single purpose of completing the machinery essential to the operation of the corporation. Under these circumstances, the subscription of the corporation's name to the writing effecting the alteration in the terms of the lease was at one and the same time both the act of the corporation and his act as an individual. Being practically owner of all the stock, he was virtually the corporation itself, or, as the cases put it, the corporation was his "corporate double." (*Relley v. Campbell*, 134 Cal. 175, [66 Pac. 220]; *Rutz v. Obear*, 15 Cal. App. 436, [115 Pac. 67].)

That, in point of fact, the appellant did personally consent to the modification of the lease, is a proposition that offers no possible pretext for debate. Maas testified, as we have shown, that Herrscher was the person most vitally interested in the lease. In fact, Maas said that he himself had no real interest in the lease and that Herrscher was the actual lessee. The latter addressed a letter (over the signature of the corporation or, to speak more accurately, over his corporate name) to the agent of the lessors, asking for a reduction of the rent, and eventually, after further negotiations, succeeded in having the rent lowered. For the corporation he signed the agreement changing the lease in that regard. Manifestly, under these circumstances, it would be absurd to say that, as the corporation, he consented to the alteration, but that, as an individual, he did not. In other words, he was himself, to borrow a colloquialism, the "body, breeches and soul" of the corporation—that is, the two were so inseparably linked to-

gether that the corporation could do no business or perform no act within the scope of its authority without such business or such act being solely for and that of Herrscher himself, and, having, as seen, personally conducted all the negotiations for himself as the corporation, it would certainly involve a palpable as well as a ridiculous solecism in the irresistible logic of the situation as it is disclosed by the circumstances presented here to say that both he and the corporation did not at one and the same time, as one and the same act, agree to a modification of the lease that would and did result in lessening, in a ratio equal to the extent of the reduction of the rent, the burden of his or its (in whatever gender it may please him to say that he assumed the obligation) liability on the bond guaranteeing the payment of the stipulated rent.

But we need consider the evidence in detail in this opinion no further. It is sufficient to say, generally, in concluding upon the question whether the findings essential to the support of the judgment are justified by the evidence, that the record is pregnant with circumstances and statements, to some of which we have not specifically adverted here, showing very clearly that the appellant personally executed the bond, personally assented to the alteration of the lease, and is, therefore, personally compellable under the obligation so assumed to execute and make good the indemnity for which he thus became personally responsible.

It is further objected that the court committed error seriously prejudicing the rights of the appellant by admitting in evidence the bond to which the name of "Joseph Herrscher & Co." was subscribed and the written instrument modifying the lease, whereby the rent was reduced. The objection to these documents was based upon the general grounds that they were irrelevant, immaterial and incompetent. The court made no mistake in receiving these instruments in evidence, as must be apparent from the conclusion at which we have arrived as to their legal effect upon the parties to this action.

The judgment and the order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 948. First Appellate District.—February 24, 1912.]

**FRANK A. FIDDYMENT, Respondent, v. M. JOHNSON
et al., Appellants.**

SALE OF BALED HAY IN BARN.—PRICE PER TON.—PART PAYMENT.—TITLE PASSED.—LOSS BY FLOOD.—RISK OF BUYER.—A sale of all the baled hay in two barns of the plaintiff to the defendants at a fixed price per ton, which were separated from all other hay in the barns, and which were exhibited and fully identified, and upon which defendants paid \$400, and was to pay the residue of the price per ton in installments upon delivery from time to time, passed a present title to the defendants to all of the baled hay; and where, without the fault of the seller, after delivery and payment for a number of installments, the undelivered bales were damaged as the result of a flood, such bales were at the risk of the buyer, and the loss must fall upon him.

ID.—CODE PROVISION AS TO PASSAGE OF TITLE TO BUYER.—Under section 1140 of the Civil Code "The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

ID.—AGREEMENT UPON PRESENT TRANSFER.—QUESTION OF FACT.—From the evidence presented to the court, it was a question of fact for the court to determine as to whether or not the parties had agreed upon a present transfer. Where the intention of the parties is not clear, but must be determined from the facts and circumstances of the case, it is a question of fact for the jury or the trial judge.

ID.—WEIGHING AND MEASURING TO ASCERTAIN FINAL PRICE.—DELIVERY AT POINT OF SHIPMENT.—If the goods sold are identified, and the parties agree upon a present transfer, it does not matter that weighing or measuring is necessary to ascertain the price to be finally paid; neither is the fact that the seller has agreed to haul and deliver the goods at some point of shipment necessarily controlling.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

James P. Sweeney, for Appellants.

Meredith, Landis & Johnson, James D. Meredith, and J. B. Landis, for Respondent.

HALL, J.—This is an appeal from a judgment and order denying defendants' motion for a new trial.

On or about the fifteenth day of January, 1907, plaintiff sold or agreed to sell to defendants all the baled hay belonging to plaintiff situated in two certain barns, at an agreed price per ton. At the time of the agreement \$400 was paid on the purchase, and thereafter, from time to time, as appellants sent their schooners for the hay, portions were delivered and subsequently paid for.

On the twenty-third day of March, however, a flood occurred, which ruined and damaged the balance of the hay as it remained in the barns, and the purchasers refusing to pay therefor, this action was brought to recover the balance as upon a completed sale of hay.

The theory of plaintiff was and is that by the contract entered into the title to the hay passed to the purchasers, and that its subsequent loss before actual delivery and removal, occurring without the fault of the plaintiff, must be borne by the purchasers.

The principal and really only point to be determined upon this appeal is as to whether or not the evidence supports the finding that title to the hay passed from the seller to the buyers at the making of the contract.

It is true that appellants in their brief raise the question as to the authority of Webber to make any contract for purchase other than one of delivery f. o. b. at the river bank or landing. But all discussion as to the agency of Webber in whatever contract he did make is foreclosed by the stipulation entered into by the appellants at the trial. It was stipulated by appellants that in the negotiations between Mr. Webber and Mr. Fiddymment in the transaction of the sale of the hay from Fiddymment to appellants, Mr. Webber was the agent of appellants. This was a full and complete stipulation that Webber was the agent of appellants in the transaction involved in this suit, and it is now too late to urge that appellants were not bound by his contract because, forsooth, he might have violated his instructions as to the terms upon which he might make purchases.

Returning, now, to the only real question involved in the appeal, does the record show sufficient to support a finding of a present sale, or transfer of title at the time of making the agreement? We think it clearly does.

"The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." (Civ. Code, sec. 1140.)

The hay in this case, as the evidence abundantly shows, was fully identified. It was all the baled hay belonging to plaintiff contained in two certain barns, a smaller and a larger barn. The smaller barn contained only baled hay, all belonging to plaintiff. The larger barn contained, besides the baled hay, some loose unbaled hay belonging to him, and some baled barley hay belonging to one Chambers. The baled hay of plaintiff in the larger barn consisted of a small portion of barley hay and alfalfa hay. The barn was divided into separate compartments. In one was baled hay belonging to Mr. Chambers; in another was baled hay, barley and alfalfa, belonging to plaintiff, and in another baled alfalfa belonging to plaintiff, and on top of this baled barley hay belonging to Mr. Chambers. There was no other baled hay in the barn. The sale was of all of plaintiff's baled hay. It was all examined and identified by Mr. Webber, who also was shown and examined the Chambers hay with a view to purchasing it, which he subsequently did. Nothing remained to be done to identify any of the hay sold. It was ready for delivery whenever it should be called for. The evidence as to what occurred at the transaction shows that Mr. Webber examined the hay, and finally agreed to buy all of plaintiff's baled hay in the two barns at a stipulated price per ton. Plaintiff then consented, at Webber's request, that the hay might remain in the barns until June 1st, to be delivered as the purchasers might send their schooners for it from time to time. After that had been agreed upon Webber asked plaintiff if he would get the hay to the river when the purchasers sent their schooners for it, and plaintiff agreed to do so. The smaller barn was situated on the river bank, but the larger barn was some 200 yards away, and the hay had to be hauled from the larger barn to the river bank. The entire contract was in parol. No time of

payment seems to have been stated, but \$400 was paid as a deposit, and other payments made from time to time as deliveries were made.

Webber was called as a witness, and remembered buying some hay from plaintiff in January, 1907, but did not remember anything of the details.

From the evidence presented to the court it was a question for the court to determine as to whether or not the parties had agreed upon a present transfer. Where the intention of the parties is not clear, but must be determined from the facts and circumstances of the case, it is a question of fact for the jury or trial judge. (35 Cyc. 278; *Prowers v. Nowles*, 42 Colo. 442, [94 Pac. 347]; *Lobdell v. Horton*, 71 Mich. 681, [40 N. W. 28]; *Sherwood v. Walker*, 66 Mich. 568, [33 N. W. 919]; *Toohey v. Plummer*, 65 Mich. 688, [32 N. W. 897]; *Fuller v. Bean*, 34 N. H. 290; *Dyer v. Libby*, 61 Me. 45; *Smith v. Friend*, 15 Cal. 124.)

If the goods are identified and the parties agree upon a present transfer, it does not matter that weighing or measuring is necessary to ascertain the price to be finally paid. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212, [9 Am. St. Rep. 199, 18 Pac. 249]; *Lassing v. James*, 107 Cal. 348, [40 Pac. 534].)

Neither is the fact that the seller has to deliver at some point of shipment necessarily controlling. In *Dyer v. Libby*, 61 Me. 45, the seller was to haul and deliver at a specified point, and it was held not controlling. In *Bill v. Fuller*, 146 Cal. 50, [79 Pac. 592], the seller was to deliver oranges, then on the tree, at the railroad station when wanted by the purchaser. The oranges sold were all that were grown by the seller except the St. Michaels. The court, speaking through Mr. Justice Shaw, in concluding its opinion said: "Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement in form imports a present sale; the thing sold was in existence and was identified and separated from other things. Under section 1141 [1140?] of the Civil Code, it would seem that title passed at once, and that the oranges remained on the tree at the risk of the buyer." (See, also, *Greenbaum v. Martinez*, 86 Cal. 459, [25 Pac. 12].)

In the case at bar the subject matter of the sale was perfectly identified, and the evidence was such as to justify the conclusion of the court that the parties had agreed upon a present transfer. The evidence therefore supports the finding that title passed to the purchaser at the execution of the contract, and the judgment and order should be affirmed. It is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 226. Second Appellate District.—February 24, 1912.]

THE PEOPLE, Respondent, v. JOSEPH LILLARD,
Appellant.

CRIMINAL LAW—MURDER—CONVICTION OF MANSLAUGHTER—KILLING OF FLEEING FELON—CRIMINAL NEGLIGENCE NOT ESTABLISHED—VERDICT UNSUPPORTED—REVERSAL.—Upon a prosecution for murder, where the defendant was convicted of manslaughter and the evidence establishes without conflict that the deceased had committed a felony and was fleeing from the pursuit of citizens with a view to apprehend him, of whom defendant was one, who commanded him to halt, which he refused to do, whereupon defendant fired the fatal shot, it is held that the evidence wholly fails to establish any criminal negligence on defendant's part, which must be proved beyond a reasonable doubt, to warrant the verdict, that there is no evidence warranting the conviction, and that the judgment must be reversed.

Id.—JUSTIFIABLE HOMICIDE.—Under section 197 of the Penal Code, homicide is justifiable when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; and the general rule is that even a private person is justified in killing a fleeing felon who cannot otherwise be taken if he can prove that the person is actually guilty of a felony.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Thomas Scott, Fred J. Spring, and J. R. Dorsey, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

ALLEN, P. J.—Defendant was informed against by the district attorney of the county of Kern for the crime of murder. Under a plea of not guilty trial was had by a jury, which by its verdict found defendant guilty of manslaughter. By the judgment of the court he was sentenced to the penitentiary for a term of ten years. From this judgment defendant appeals.

The undisputed facts presented by the record are these: About the 20th of January, 1911, one Rosa Brown, a prostitute, living in what is known as the tenderloin district of Bakersfield, was attacked in her house by deceased, who assaulted her with the evident intent of robbery, knocking her to the floor, and when the woman began to scream "murder" and "police," deceased ran from the house. The woman continued her screams of "stop thief," "murder," "police," and these cries were taken up by a crowd upon the streets. Deceased continued to run down the street, when defendant, who was a bartender in a saloon located in the same red-light district, hearing the woman's cries, and seeing the man running and the crowd following thereafter, and believing that a crime had been committed and that the fleeing man was the criminal, took a pistol which was lying upon a shelf behind the bar and ran into the street, joining in the pursuit. The defendant seemed to be in the lead of the crowd, and deceased paid no attention to the demands to stop, and about the time he was reaching a dark place in the street, when at a distance of about forty feet or more ahead of defendant, defendant fired a shot, from the effects of which deceased's death ensued. Immediately after firing the shot a police officer and others came up and defendant told them that the man was "lying over there," pointing to the place where the deceased was lying, and said, "I got him." Whether this last statement was voluntarily made, or was in response to a question of the police officer, is not clear. Defendant, however, said to the police officer: "If I am wanted, I will be at the Bowling Alley saloon." He immediately returned to the saloon, replaced the weapon on the shelf, and a few minutes thereafter the officers came

in and arrested him. There is and can be no question from the record that a felony had been committed; that the deceased had committed the felony; that the defendant had reason to believe and did believe these facts, and that he pursued the deceased with the intent to capture him, and for no other purpose. The defendant had no acquaintance with the woman who was the victim of the attempted highway robbery; no acquaintance with the deceased, and no fact even suggesting in the most remote degree any motive on the part of defendant, other than a lawful one of apprehending a felon, is to be found in the record. The court very properly charged the jury that if the defendant saw the deceased running at night and heard persons crying out "stop him," "catch him," "he did it," "he is the robber," and the deceased being ordered by defendant three or four times to stop and he refused to do so and continued his flight, then the defendant had reasonable cause to believe the deceased had committed a felony. The jury were further instructed that a private person may arrest without a warrant one who has committed a felony, if he has reasonable cause for believing the person arrested to have committed it, and that an arrest may be made by a peace officer or by a private person. Further, that such peace officer or private person in making the arrest may use such force as is necessary to arrest the felon, even to the extent of killing him when in flight. Further, that to warrant a private citizen in making an arrest without a warrant there must exist a state of facts that would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty. This last instruction, in view of the uncontradicted evidence establishing probable cause, might, if standing alone, have misled the jury through the suggestion that the question of probable cause under such circumstances was one of fact, but considering such instruction with the first instruction given, which was to the effect that from the evidence, as a matter of law, probable cause for making the arrest existed, we can see no prejudice necessarily resulting. The only question of fact presented to the jury related to the matter of criminal negligence. A careful examination of the record fails to disclose any evidence tending to establish criminal negligence, a fact which

must be established beyond a reasonable doubt in order to warrant conviction. Section 197 of our Penal Code provides that homicide is justifiable when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed. Wharton on Homicide declares the rule, and quotes abundant authority in its support: "Even a private person is justified in killing a fleeing felon who cannot otherwise be taken, if he can prove that the person is actually guilty of the felony." (Sec. 492.) We are of opinion that the uncontradicted evidence in this case fails to establish beyond a reasonable doubt, or otherwise, criminal negligence upon the part of the defendant. If officers and citizens are to be punished for an effort to suppress crime and to bring to justice those who commit offenses against the law, it is but offering a premium for crime. The facts appearing in the record that the woman attacked was a prostitute, and that defendant was a bartender, have no signification. Whatever may have been their employment in life, they were and are entitled to the same protection of life and liberty as other citizens, and the defendant, regardless of such occupation, possessed the same right as any other private citizen to apprehend the deceased, who had been guilty of a felony.

We are of opinion, therefore, that there is no evidence in this case warranting the defendant's conviction and supporting the judgment, and the judgment is reversed.

James, J., and Shaw, J., concurred.

[Civ. No. 1054. Second Appellate District.—February 24, 1912.]

JOHN L. PATTERSON, Respondent, v. CLARENCE T. TORREY, Appellant.

BROKER'S COMMISSIONS—ORAL REQUEST FOR SERVICES—STATUTE OF FRAUDS—MEMORANDUM IN WRITING REQUIRED.—The fact that a broker, suing for commissions, on a sale of real estate, performed valuable services for the defendant at his oral request, cannot authorize the recovery of any compensation therefor, in the absence of some note or memorandum in writing, subscribed by the defendant,

whereby plaintiff was employed or authorized to negotiate the sale or exchange, as required by subdivision 6 of section 1624 of the Civil Code.

Id.—IMPROPER FINDING—INCONSISTENCY WITH PLAIN IMPORT OF LANGUAGE USED.—It is held that, while the court finds that the instrument was made and delivered by the defendant "for the purpose of authorizing the plaintiff, as such real estate broker, to make such sale and exchange of said property of defendant for commission on the terms and price specified for defendant," nevertheless the purpose specified in such finding is wholly inconsistent with the plain import of the language used by the parties.

Id.—NAKED ACT OF OWNER FIXING PRICE.—The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Watkins & Blodget, for Appellant.

Trusten P. Dyer, and Murphey & Poplin, for Respondent.

SHAW, J.—Action by real estate broker to recover commissions for negotiating a sale and exchange of real property valued at \$20,000.

Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

It appears from the allegations of the complaint and findings of the court that defendant, after making an unsuccessful attempt to negotiate an exchange of his property with one Charles H. McFarland, signed and delivered to plaintiff a writing as follows:

"Mr. Patterson: At your request, I will give you the price wanted for my house 2659 Ellendale place.

"For the place bare of all hangings and draperies—\$20,000 00/xx.

"For the place including hangings and draperies, window curtains and etc., \$23,500.00.

"I will accept in exchange Mr. McFarland's home on either proposition at a valuation of \$8,000 00/xx. Balance cash.

"(Signed) C. T. TORREY."

And thereupon, as alleged and found by the court, requested plaintiff to see Mr. McFarland in regard to making the exchange. As requested by defendant, plaintiff saw McFarland and procured from him an acceptance of the offer made by defendant to plaintiff, in accordance with which the sale and exchange were consummated.

While upon the record there can be no doubt as to the fact that plaintiff performed valuable services at defendant's oral request, nevertheless, the law is too well settled to admit of controversy that there can be no recovery of compensation therefor, in the absence of some note or memorandum in writing subscribed by the defendant, whereby plaintiff was employed or authorized to negotiate the sale or exchange. (Civ. Code, subd. 6, sec. 1624.) The writing does not purport to be other than a statement fixing the price at which defendant was willing to sell his property, and expressing his willingness to accept McFarland's home at a valuation of \$8,000 in part payment of the price so fixed. It is impossible to construe the instrument as constituting an employment of plaintiff by defendant, or conferring upon him any authority to negotiate a sale or exchange for a compensation or commission. While the court finds that the instrument was made and delivered by defendant "for the purpose of authorizing the plaintiff, as such real estate broker, to make such sale and exchange of said property of defendant with said Charles H. McFarland, for commission, on the terms and price specified by defendant," nevertheless, such purpose is wholly inconsistent with the plain import of the language used by the parties. The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property.

For the reason that the record discloses no employment of plaintiff evidenced by writing, under which defendant either

directly or by implication agreed to pay him a compensation for his services, the judgment and order are reversed.

Allen, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 25, 1912, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on April 24, 1912.

[Civ. No. 923. First Appellate District.—February 26, 1912.]

MILLIE JESSEN, Formerly MILLIE RING, Respondent, v. PETERSON, NELSON & CO., a Corporation, Appellant.

FINDINGS—DUTY OF COURT—MATERIAL ISSUES—ULTIMATE FACT—PROBATIVE FACTS.—It is the duty of the trial court to find upon all of the material issues raised by the pleadings; and ordinarily it is necessary to the validity and sufficiency of findings that such court should find the ultimate fact in issue, or such probative facts as will enable the court to declare that the ultimate fact necessarily results therefrom. Where probative facts are found from which the existence of the ultimate fact may be conclusively inferred, the finding is sufficient, and a judgment based thereon will be sustained.

Id.—ACTION FOR DAMAGES FOR PERSONAL INJURIES—FINDINGS UPON MATERIAL ISSUES—ULTIMATE FINDING IN CONCLUSIONS OF LAW.—Where, in an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the defendant, the court found for the plaintiff upon all of the material issues, and made an ultimate finding as to the total amount of damages sustained, in its conclusions of law, and rendered judgment therefor, the trial court's declaration that the plaintiff was entitled to a judgment therefor as the result of the damage inflicted by defendant was in effect a finding of the ultimate fact that plaintiff had been damaged to that amount.

Id.—CONSTRUCTION OF FINDINGS—POSITION IMMATERIAL—SUPPORT OF JUDGMENT.—The mere presence of the ultimate finding as to the amount of damages in the conclusions of law, rather than in the findings of fact, where it belonged, did not detract from or destroy its efficacy as a finding of fact; and so construed and read in conjunction with the preceding probative facts found by the court, it is sufficient to support the judgment upon the issue of damages.

ID.—CAUSE OF PLAINTIFF'S INJURIES—NEGLIGENT DRIVING OF DEFENDANT'S HORSE AND BUGGY—SUPPORT OF FINDING AS TO OWNERSHIP AND CONTROL—PROOF OF LIABILITY.—Where the alleged cause of plaintiff's injuries was the negligent driving of defendant's horse and buggy, and it was an admitted fact that the horse and buggy belonged to the defendant corporation, and that the driver was its vice-president and general superintendent of its work, "who had the right to operate the buggy" in the performance of its work, a finding of defendant's ownership of the horse and buggy, and that it was "wholly in the possession and control of the defendant at the time of the injury," was sufficiently sustained; and that the injury was the result of the negligence of such driver is all that need be shown to charge defendant with liability.

ID.—ACCEPTED RULE AS TO NEGLIGENCE OF EMPLOYEE INTRUSTED WITH CHARGE OF VEHICLE.—It is the accepted rule that, where an employee is intrusted with the possession and operation of a vehicle, with permission to use it, in his discretion, in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employee in the use and operation of the vehicle; and, in such a case, it is not necessary for the person seeking damages to prove that, at the time of the injuries, the employee was engaged in executing any particular business or specific command of his principal.

ID.—SUFFICIENCY OF SHOWING OF NEGLIGENCE—TORT IN GENERAL—SCOPE OF EMPLOYMENT.—That the employee, at the time of the commission of the tort, was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

N. A. Dorn, for Appellant.

William M. Cannon, and S. W. Molkenbuhr, for Respondent.

LENNON, P. J.—In this action the plaintiff recovered a judgment against the defendant for the sum of \$1,000, as damages for personal injuries, alleged to have been caused by the negligent and reckless driving of a horse and vehicle owned

by the defendant and which, at the time of the accident, was being used in the business of the defendant and under the control of one of its agents.

The plaintiff's complaint alleged damages to her as the result of the accident, aggregating the sum of \$2,310. Of this amount \$2,000 was claimed for injuries to plaintiff's person and \$310 was alleged to have been expended by her for nursing, medicines and surgical attendance.

The answer of the defendant specifically denied the existence of the damages pleaded, and upon the issue thus raised the trial court found for the plaintiff to the extent of \$122.50 for money expended in medical attendance, but omitted in its findings of fact to designate the specific amount in which the plaintiff was damaged on account of personal injuries. The court did find however:

"1. That the plaintiff, at the time of the commencement of this action, was a *feme sole*; that since the said action was commenced plaintiff married. . . .

"3. That on the twelfth day of October, 1907, a horse and buggy owned by the defendant corporation, and wholly in the possession and under the control of said defendant corporation, was being driven along, over and upon Market street, a public highway and street in the city and county of San Francisco, and when at or near the junction of the following named public streets in the city and county of San Francisco, to wit, Jones, Market and McAllister streets, the defendant corporation handled, managed and drove said horse and buggy in such a careless, negligent, reckless and fast manner as to cause the defendant's buggy to strike the plaintiff and violently throw her to the ground and thereafter drag her for some distance, thereby bruising her body and breaking her right leg."

With the exception of the omission heretofore noted the trial court found specifically in favor of the plaintiff upon every material issue in the case, and from the findings as a whole deduced the single conclusion of law "that the plaintiff is entitled to judgment against the defendant in the sum of \$1,000."

This appeal is from the judgment and from an order denying the defendant a new trial.

It is now insisted upon behalf of the defendant that the findings upon the issue of damages do not support the judg-

ment because of the neglect of the trial court to specifically designate in the findings of fact the amount in which the plaintiff was damaged by reason of the injuries alleged and found to have been inflicted upon her person.

Undoubtedly it was the duty of the trial court to find upon all of the material issues raised by the pleadings, and the judgment in the present case could not be upheld if it were true, as defendant claims, that there was an utter failure to find the facts of a material issue upon which a finding, had one been made, would not necessarily have been adverse to the defendant.

Ordinarily it is necessary to the validity and sufficiency of findings that the trial court find the ultimate fact in issue, or such probative facts as will enable the court to declare that the ultimate fact necessarily results therefrom; but where probative facts are found from which the existence of the ultimate fact must be conclusively inferred the finding is sufficient, and a judgment based thereon will be sustained. (*Coveny v. Hale*, 49 Cal. 556; *Smith v. Acker*, 52 Cal. 219; *Mott v. Ewing*, 90 Cal. 231, [27 Pac. 194]; *Alhambra Water Co. v. Richardson*, 72 Cal. 598, [14 Pac. 379].)

In the case at bar the probative facts upon which rested the allegations of plaintiff's personal injuries were fully found in her favor, and it necessarily follows from those facts that she must have suffered damage to her person in some amount which, although not specifically stated in the findings of fact, can be readily ascertained by deducting the amount of money found to have been expended by her for medical attendance from the total amount which the court, in its conclusions of law, declared would compensate for all damages sustained by her as the result of the defendant's negligence. The trial court's declaration that the plaintiff was entitled to a judgment for \$1,000 as the result of the damage inflicted by defendant was in effect a finding of the ultimate fact that the plaintiff had been damaged to that amount, and its mere presence in the conclusions of law rather than in the findings of fact, where it belonged, and should have been placed, did not detract from or destroy its efficacy as a finding of fact. So construed and read in conjunction with the preceding probative facts found by the court, it is sufficient to support the judgment upon the issue of damages. (*Jones v. Clark*, 42 Cal.

180; *Breuner v. Liverpool etc. Ins. Co.*, 51 Cal. 101, [21 Am. Rep. 703]; *Edwards v. Sonoma Valley Bank*, 59 Cal. 148; *Bath v. Valdez*, 70 Cal. 350, [11 Pac. 724]; *Foot v. Murphy*, 72 Cal. 104, [13 Pac. 163]; *Burton v. Burton*, 79 Cal. 490, [21 Pac. 847]; *Millard v. Legion etc.*, 81 Cal. 340, [22 Pac. 864]; *McCray v. Burr*, 125 Cal. 636, [58 Pac. 203].)

The further point is made that the evidence is insufficient to support the findings in this, that the evidence offered and received in support of plaintiff's case falls short of showing that the person in charge of the horse and buggy was, at the time of the accident, in any wise occupied in the performance of any duty relating to the business of the defendant.

Neither the purpose for which the defendant was incorporated nor its business are definitely stated in the record before us, but it may be fairly inferred from the evidence upon the whole case that the defendant at the time of the accident was engaged in general contracting and construction work in the city and county of San Francisco. It was an admitted fact in the case that the horse and buggy belonged to the corporation defendant, and that the driver, Charles Nilson, "was an officer of the defendant who had the right to operate the buggy." Nilson was the vice-president of the defendant, and testified as a witness in its behalf. Upon his cross-examination it developed that in the performance of his duties as vice-president he "had no regular hours whatsoever; that he had to go around all over the city sometimes; had to go out to the park and Richmond, where the corporation was working at the time; had to go everywhere and see that the work was all right."

From this it would appear that in addition to being vice-president of the defendant, Nilson was also the general superintendent of its work, and that in the performance of his duties he was granted a roving commission which permitted him to look after the business of the defendant at the times and in the manner which best suited his own convenience. It is the accepted rule in this and other jurisdictions that where an employee is intrusted with the possession and operation of a vehicle, with permission to use it at his discretion in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employee in the use and operation of the vehicle; and in such a case it is not necessary

for the person seeking damages to prove that at the time of the injuries the employee was engaged in executing any particular business or specific command of his principal. That the employee, at the time of the commission of the tort, was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury. (*Mulvehill v. Bates*, 31 Minn. 364, [47 Am. Rep. 796, 17 N. W. 959]; *Rahn v. Singer Mfg. Co.*, 26 Fed. 912; *Riordan v. Gas Consumers' Assn.*, 4 Cal. App. 639, [88 Pac. 809].) This being so, it is clear in the present case that the testimony of Nilson, coupled with the admitted fact that the defendant was the owner of the horse and buggy, and had conferred upon Nilson the right of using the same in its business, sufficiently supports the trial court's finding that the horse and buggy were owned by the defendant, and "wholly in the possession and under the control of the defendant" at the time of the accident.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Hall, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 26, 1912.

[Civ. No. 1018. Second Appellate District.—February 26, 1912.]

HELEN MAY RICH, Executrix of the Estate of C. L. RICH,
Deceased, Respondent, v. THE EDISON ELECTRIC
COMPANY, a Corporation, Appellant.

CORPORATIONS—TREATMENT OF PERSON INJURED WITHOUT OBLIGATION FOR INJURY—LIABILITY FOR HOSPITAL CHARGES—OSTENSIBLE AUTHORITY OF AGENTS.—A corporation is liable for hospital charges for the care of a person injured through instrumentalities used by it, although no legal or moral obligation may rest upon the corporation to care for him, where officers and agents of the corporation, with ostensible authority, directed the hospital authorities to take

charge of such person, and to continue the service. One who was assistant to the general manager of the corporation, with authority to look after its interests in his absence, had ostensible authority, in the absence of the manager, to contract, in an emergency, for such hospital service, and its chief surgeon had such authority to direct its continuance.

ID.—RULE AS TO POWER OF SUBORDINATE EMPLOYEES TO CONTRACT FOR CARE OF PERSONS INJURED.—As a rule, even subordinate employees of a corporation, who under ordinary circumstances have no power to bind the corporation by contract, possess power, where an urgent necessity exists for immediate employment, by reason of injuries incident to the operations of the corporation, to employ medical help to alleviate the condition of persons so injured.

ID.—RIGHT OF OWNER OF HOSPITAL TO ASSUME THAT POWER OF ASSUMED AGENTS EXISTED—KNOWLEDGE OF MANAGER—PRESUMPTION. The plaintiff, as the owner of the hospital, had the right to assume that persons representing the heads of departments of the corporation defendant possessed the authority which they represented; and where it appears that the general manager of the corporation had knowledge of the conditions and took no action personally, his acquiescence and that of the corporation must be presumed.

ID.—SURGICAL SERVICES NOT CONTRACTED FOR—NONLIABILITY OF CORPORATION.—Where surgical services were rendered in the hospital before any instructions in that behalf were given by any officers of the corporation, and there is nothing in the record to disclose that any legal liability existed against the corporation otherwise, to pay for such surgical services by reason of any negligence on its part causing the injury, the corporation is not liable for such surgical services, though necessary to save the life of the person injured. For aught that appears, the surgical services were voluntarily performed, and the defendant owed no legal duty to pay therefor.

ID.—SETTLEMENT OF ACTION BY PERSON INJURED AGAINST CORPORATION—LEGAL LIABILITY NOT ESTABLISHED.—The mere settlement of an action brought against the corporation defendant by the person injured, by the payment of a specific sum to secure its dismissal, does not of itself establish the matters involved in the question of legal liability. It may be, and often is, the case that actions of this character are settled and dismissed where no liability exists, other considerations entering into the transaction.

APPEAL from a judgment of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

H. H. Trowbridge, for Appellant.

Williams & Rutan, for Respondent.

ALLEN, P. J.—There is evidence in the record tending to show the following facts: On the 26th of September, 1908, one E. H. Lapier received serious injuries at a water plant belonging to the Fullerton Domestic Water Company, of which company he was an employee; that the injury was occasioned by coming in contact with certain electric wires supplying electric current to the pumping plant, which wires were the property of the defendant, and were under the control of one Boone, an employee of defendant. Upon the occurrence of the injury Boone called plaintiff to the scene, and upon plaintiff's arrival Lapier was immediately taken to a hospital at Fullerton owned by plaintiff, and plaintiff, a skillful surgeon, immediately proceeded, with the assistance of other surgeons, to amputate a leg and to perform other operations necessary for the preservation of the life of Lapier. About the time these operations were concluded, nothing remaining to be done except to apply some dressings, one Dr. Stinchfield, acting at the time as or for the chief surgeon of defendant, arrived upon the scene, made a cursory examination of the injured man's condition, recommended that certain things be done, and directed the hospital authorities to give the patient every possible care. This was done at great expense and trouble to the hospital authorities, the services for which were reasonably worth \$397, \$70 of which was subsequently paid by check forwarded by A. L. Selig, assistant to the president and general manager of defendant, in the letter inclosing which check was a statement by said Selig that the payment was on account of the Edison Electric Company. Within a day or two after the injury to Lapier, Selig had told the hospital authorities to take every care of the patient and that defendant would see to their compensation. The surgical services in connection with the amputation, and which were rendered before the representative of the general manager or chief surgeon of defendant arrived upon the scene, were necessary for the preservation of the life of the patient, and were well worth \$1,000. Plaintiff, after a refusal upon the part of defendant to pay the bill, brought this action to recover the sum of \$1,400, including the surgical services and the hospital charges. The case was tried by a jury and a verdict returned against defendant

for \$827. From the judgment rendered thereon the defendant appeals under the alternative method and presents a transcript of all of the testimony offered or received, together with all rulings and instructions had during the progress of the trial.

There is evidence in the record ample in support of the verdict as to the hospital charges. It matters not whether any legal or moral obligation rested upon defendant to care for this injured man; it is sufficient that his injury was occasioned through instrumentalities employed by the defendant, and that officers and agents of defendant with ostensible authority directed the hospital authorities to continue the service. The evidence is undisputed that a medical department of defendant, under the charge of Stinchfield, was maintained by authority of the corporation for the purpose of looking after persons who were injured on the system, and that the chief surgeon had been authorized to make arrangements for their care in outside towns when injuries occurred. In addition to this, Selig was assistant to the president of the company, who was also its general manager, with authority to look after the interests of the company where special attention could not be given by the general manager at the time, and it must follow that where he acted in the line of his employment, he was the representative of the general manager, and in an emergency of the kind here presented possessed the authority in behalf of the company to look after this injured man, even though technically no liability attached to the company on account of the injury. The rule, to our mind, is well established that even subordinate employees of a corporation, who under ordinary circumstances are not empowered to bind the corporation by contract, nevertheless possess power, where an urgent necessity exists for immediate employment by reason of injuries incident to the operations of the corporation, to employ medical help to alleviate the condition of persons so injured; and we are of opinion that the plaintiff in this case had the right to assume that these representatives of the heads of their respective departments possessed the authority which they assumed, and it appearing that the general manager of the company had knowledge of the conditions, and took no action personally in the premises, his acquiescence and that of the corporation must be presumed.

A different question, however, is presented as to the surgical services performed before any instructions were given by the officers of the corporation. It may be true that had the record disclosed the fact that the injury to Lapier was occasioned through the negligence of the defendant company, from which would arise a legal obligation imposed by law (Civ. Code, sec. 1714), and surgical services were rendered to save the life of an injured one, thereby lessening the damages which would thereafter result to the corporation in the event of the death, the corporation would not be heard to say that such services rendered for its benefit were unauthorized, and thus avoid payment. But an examination of the record in this case fails to disclose that any legal liability existed on the part of defendant corporation by reason of this injury. It is true that a stipulation is found in the record to the effect that the injured man brought suit against the company, and that subsequently the same was settled and dismissed through the payment of \$4,500. The mere settlement of an action for damages brought against a defendant does not of itself establish the matters involved in the question of legal liability. It may be, and often is, the case that actions of this character are settled and dismissed where no liability exists, other considerations entering into the transaction. We think that if the negligence of defendant occasioned the injury in this case, it should have been established, in order that it be made to appear that plaintiff performed a duty devolving by law upon defendant and for which, in equity and good conscience, he should be compensated. For aught that appears in this record, the surgical services were voluntarily performed and no legal duty rested upon defendant corporation to compensate plaintiff therefor. The verdict in this case, under the evidence, then, being much in excess of what we regard as a proper verdict, and which of necessity must have included a portion of the services rendered voluntarily should be reversed.

Judgment reversed and cause remanded for a new trial.

James, J., and Shaw, J., concurred.

[Crim. No. 169. Third Appellate District.—February 26, 1912.]

THE PEOPLE, Respondent, v. ELVI LEWIS, Appellant.

CRIMINAL LAW—STATUTORY RAPE—INTERCOURSE WITH STEP-DAUGHTER—SUPPORT OF VERDICT—UNCORROBORATED EVIDENCE OF PROSECUTRIX—PRESUMPTION—REVIEW UPON APPEAL.—Where the defendant was accused of statutory rape by sexual intercourse with his step-daughter of the age of thirteen years, and was convicted upon her uncorroborated testimony, it is held that it must be assumed upon appeal, in the absence of anything appearing in the record to the contrary, that the jury reached their verdict with a full realization of their sworn duty, free from passion or prejudice, and also that the trial judge, who refused a new trial, was satisfied with the verdict, and that it cannot be said that a condition of the record appears which would warrant this court in interfering with the verdict.

ID.—REQUESTED INSTRUCTIONS PROPERLY REFUSED—DANGER OF CONVICTION UPON UNCORROBORATED EVIDENCE—CAUTION AS TO EVIDENCE LONG AFTER OFFENSE.—The court properly refused requested instructions for the defendant, one of which stated that "in the absence of corroborating testimony, it is dangerous to find a verdict of guilty," and the other of which stated "that the testimony of children should be received with great caution, and this is especially the case when the children are of tender years, and the events they are relating happened a long time previous to the time they are on the stand," where it appears that the offense charged occurred in April, and the trial occurred in the following June, and the court gave proper cautionary and admonitory instructions.

ID.—CONSTRUCTION OF CHARGE OF COURT—LAW OF REASONABLE DOUBT—CONVICTION ON SOLE EVIDENCE OF PROSECUTRIX.—Where the court fully instructed the jury as to the law of reasonable doubt, and that they "must find that each and every fact essential to conviction must be proved beyond all reasonable doubt and to a moral certainty," it is not necessary to repeat that law with every instruction, and it must be held implied in an instruction that "if the jury believe the prosecutrix, they can convict on her evidence alone." It must be presumed that the jury understood from the instructions that they were not required to convict on the evidence of the prosecutrix unless convinced of the truth of her evidence beyond a reasonable doubt.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

Ben Berry, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, Deputy Attorney General, for Respondent.

CHIPMAN, P. J.—Defendant was accused by information, tried by a jury and convicted of the crime of rape committed on April 17, 1911, upon a child under the age of sixteen. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The verdict was, "Guilty of rape as charged. We recommend him to the mercy of the court." He was sentenced to imprisonment for ten years.

The defendant being unable to employ counsel, the court appointed Mr. Ben Berry as his attorney, who conducted the defense at the trial with zeal and ability, and is prosecuting this appeal with apparent belief in the innocence of his client.

The prosecutrix is defendant's step-child and at the time of the alleged offense was of the age of thirteen years. Defendant was then and had long been afflicted with weak and inflamed eyes, nearly blind, and deprived of one leg and was at times under treatment by a physician, although the evidence did not show lack of copulative capacity. He was living in Stockton with his mother, Mrs. Sarah Lewis, and his married sister, Mrs. Turner, and three younger brothers and sisters, before his marriage with the mother of the prosecutrix, Mrs. Emily Hamilton, then a widow. The mother and her child had lived in Lodi, and in the early part of 1909 moved to Stockton and took up their residence with Mrs. Lewis, defendant's mother. Both Mrs. Lewis and Mrs. Hamilton were working women, sometimes going out to families and at other times doing washing at home for patrons. The prosecutrix went to public school with the other children. In September, 1909, defendant married Mrs. Hamilton while living in the family of his mother, Mrs. Sarah Lewis, and not long after moved to a house at a place called "the homestead," in another part of the city of Stockton. This was a house of three rooms, one of which was a kitchen, where there was also a bed. It was at this house and on this kitchen bed that the particular act is alleged to have occurred. Part of the time,

prior to April 17, 1911, a Mrs. Johnson lived with the family at the homestead. The child, Angie, attended public school not far distant. Both Mrs. Lewis, defendant's wife, and Mrs. Johnson, while living with the family, worked out generally, but not always, on alternate days, one remaining at home to do the work. Mrs. Johnson was not living with them in April, 1911. The story told by the child involves the conduct of defendant while living at his mother's house, both before and after his marriage, as also in the house at the homestead. The verdict has no foundation other than the testimony of the prosecutrix, which is not corroborated by any circumstance or fact, except it be the result of the examination made by witness, Dr. Miller, and by him only to the extent of appearances, not necessary to mention, known by physicians to indicate sexual intercourse with someone. This fact, as corroborating evidence pointing to defendant, lost its force by admitted conduct of the prosecutrix with other persons. Counsel urge with earnestness that the verdict, based upon the uncorroborated testimony of his accuser and upon a narrative of facts in itself unbelievable, was the result of passion and prejudice and was without substantial justification. The prosecutrix was permitted, without objection, to lay bare her life both on the examination in chief and on her cross-examination, at the time she lived in Lodi, then but ten or eleven years old, until the date of the particular act, in 1911, selected by the prosecuting attorney. The record shows that it was with great difficulty the witness was brought to the point of telling her story and then only after much urging by the prosecuting attorney and intimations by the court that she must answer the questions or render herself liable to punishment. Apparently her hesitation was not from a sense of shame or delicacy of feeling or failure to understand the questions or from fear, and yet the substantial facts finally came out only in answer to leading questions in which the prosecuting attorney himself narrated the circumstances in their sequence and the witness answered yes or no as the question seemed to require. According to the testimony of the witness given at the preliminary, defendant's intercourse with her commenced six or seven months before his marriage to her mother and was kept up twice a week, on Mondays and Saturdays; that before that time he had conducted himself with her in a lascivious manner; that after his

marriage he continued this intercourse twice a week up to April, 1911; at the trial she reduced the frequency of intercourse at Mrs. Sarah Lewis' house, before defendant's marriage, to once a month but adhered to her statement that it had continued twice a week most of the time after his marriage and for six or seven months prior to April, 1911, at the homestead; that it occurred in every instance in the home where they were living at the time—at Mrs. Sarah Lewis' house, where six or eight people were living, young and old, and at the homestead where, at least, a considerable part of the time, Mrs. Johnson lived with the family; that the days were chosen, Mondays and Wednesdays, when her mother went out to work. She testified that she had once, while living in the Lewis house on Washington street and before the marriage of defendant, accused one Masterson of having intercourse with her and she immediately told her mother of the fact. Some investigation followed and she afterward retracted and the investigation ceased. It appeared also that she had been approached by certain boys and certain suggestions were made to her by at least two other men, of all which she promptly told her mother. There seemed to be no lack of confidence between mother and child, and yet she admitted she never told her mother of defendant's advances either at the early stage of his alleged relations nor at any other time, although they were continued uninterruptedly for over two years. When asked why she did not tell her mother she answered, "I don't know." It was not until her conduct with certain boys with whom she associated led to her being taken before the juvenile court that she divulged her relations with defendant. There was no evidence that defendant had ever been seen in a compromising situation with the child, or that he had ever been seen to show her any affectionate or loving attention or she any toward him—indeed, on the contrary, she admitted that he had corrected her and at times restrained her from going to places he thought improper for her, though she said she bore him no ill-will. The mother of the witness and the adult persons who had lived in the same house with defendant, at his mother's and at the homestead, testified that they never saw or heard of any act of impropriety of defendant toward this child. The story of the particular act, as brought out in the manner above stated, was that it occurred on

Monday, April 17, 1911, in the kitchen; that her mother got up that morning, leaving her husband in bed and about 8 o'clock went away to work; that witness was working in the kitchen and defendant asked her to come to bed with him, which she did. The details of this incident as assented to by the witness, in response to the questions as put to her, are unprintable and disclose a condition of mind in the participants which should shock the sensibility of persons not abnormally depraved. Her mother testified that her husband got up from the bed where they had been sleeping about the time she did on that April morning; that he went to the barn to do some work about making a chicken-house and she went with him and while there called to her daughter to bring some tool that was needed. Defendant told the same story. The prosecuting witness was asked if defendant had not called to her on that morning to bring this tool and her answer was she didn't remember. This was Easter Monday and was by this circumstance fixed in the memory of all these witnesses. If the mother's testimony was true, the story told by her daughter was false—both could not be true. It need hardly be added that defendant as a witness denied ever having had sexual intercourse with this child. His testimony, generally consistent, while disclosing under a severe cross-examination no circumstance in any wise corroborating the story of his step-daughter, was not calculated to make a favorable impression on the jury, but in the testimony of the mother there is, on the face of the record, nothing calculated to discredit her. Believing in her husband's innocence, it was natural that she would shield him so far as she could, and it was for the jury to judge how far this motive would lead her in an effort to save him.

In many respects the case presents to our minds the most perplexing problem on the question of the sufficiency of the evidence we have ever encountered in this class of crimes. It would seem almost incredible that the defendant could, in the midst of the surroundings disclosed, have kept up this almost unbroken, this frequent illicit cohabitation with this child for so long a period of time and no one have observed a single incriminating circumstance tending to corroborate her story. And yet, it is shown that she early developed puberty; that she had a natural tendency to indulge her sexual passion

and showed no special aversion to improper advances; that there was opportunity notwithstanding the fact, strongly urged, of the many persons in the household; that on the witness-stand she displayed no such weakness of mind as to arouse doubt of her fully understanding the gravity of the occasion and the consequences likely to follow to defendant from her testimony. Nor did she, under a very searching cross-examination, show malice toward the defendant or any motive to shield any other person by falsely fixing her relations with others upon him. The court allowed unusual freedom to counsel in his effort to penetrate and discredit the circumstances of this child's life and her relations with defendant as narrated by her. Her manner and deportment on the witness-stand; her apparent intelligence and appreciation of what she was saying and its consequences, are tests of her truthfulness of which the reviewing court is deprived. We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. Cases have occurred, some are cited, where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury.

In *People v. Kuches*, 120 Cal. 569, [52 Pac. 1003], the court said: "By denying the motion for a new trial the learned judge of the court below has manifested his satisfaction with its sufficiency (the sufficiency of the evidence); his opportunity to form a correct conclusion upon the weight and effect of the evidence was far better than ours, and his conclusion cannot be disturbed." (See, also, *People v. Benc*, 130 Cal. 168, [62 Pac. 404]; *People v. Logan*, 123 Cal. 414, [56 Pac. 56].) As above intimated, we must find in the record full justification for believing that the verdict was the expression of passion

and prejudice rather than deliberate judgment, before we should interfere. We cannot say that such a condition is here shown.

It is claimed that the court erred in refusing to give the following instruction: "You are instructed that in the crime of rape a person may be convicted upon the uncorroborated testimony of the prosecutrix, but you are instructed that should you find that the testimony of the prosecutrix is not sustained by facts and circumstances corroborating it, you should proceed in your deliberations with great caution, as in the absence of corroborating testimony it is dangerous to find a verdict of guilty."

The following instruction was requested by defendant and refused by the court: "The testimony of children should be received with great caution, and this is especially the case when the children are of tender years and the events they are relating happened a long time previous to the time they are on the stand."

The court instructed the jury as follows:

"The court instructs you that you are the sole judges of the weight of the testimony which has been introduced before you, and that in determining what weight to give the testimony of the prosecuting witness in this case, you should take into consideration her appearance while on the stand, her apparent interest, or lack of interest in the proceedings, if any appear, *her age* and her manner of testifying, and in the light of all her testimony, and of all other evidence in the case, you should give her testimony such weight, and only such weight, as you think under all the circumstances it is entitled to.

"In the consideration of the testimony of the prosecuting witness, you should take into consideration all of the facts and circumstances surrounding the place where the crime is alleged to have been committed, and you should consider all the facts and circumstances at the time and immediately after the offense is charged to have been committed in determining the weight of her testimony and the reasonableness of her story, as tending to show to your minds the credit to be given the same."

Just what effect on the verdict it would have for the court to tell the jury that it would be "dangerous to find a verdict of guilty" is difficult to conjecture. It is quite certain that

the tendency of such a caution would be to greatly weaken the instruction, concededly correct, that the jury may convict on the uncorroborated testimony of the prosecutrix. To tell the jury that to do this "would be dangerous" would, we think, be an unwarranted suggestion to come from the court. As to the other instruction, the record shows that the trial occurred in June, and the offense charged occurred in the previous month of April. The events narrated did not happen a long time previous to the trial, as the instruction assumes. The instructions given by the court, it seems to us, were sufficiently cautionary and admonitory, and that defendant was not prejudiced by the refusal complained of.

The court instructed the jury as follows:

"The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact, except perjury and treason.

"If the jury believe the prosecutrix, they can convict on her evidence alone.

"While it is true that the charge of rape is easily made and difficult to defend, yet if you are convinced from all the facts and circumstances in evidence that the defendant is guilty, then it is your duty to so find."

The court also instructed the jury that before they could find the defendant guilty they "must find that each and every fact essential to the establishment of his guilt has been proven beyond all reasonable doubt and to a moral certainty." The jury were given the usual definition of reasonable doubt. The above instructions were followed by the instructions first above considered, and all of them should be taken together in any fair attempt to understand their true significance and meaning and the impression they were calculated to make on the jury. Appellant selects for his criticism the following: "If the jury believe the prosecutrix, they can convict on her evidence alone." The objection made is that, under such an instruction, "it was not necessary that the jury should believe the testimony of the prosecuting witness beyond a reasonable doubt in order to find the defendant guilty as charged." The jury were clearly instructed that every fact essential to the establishment of the charge should be proved beyond all reasonable doubt and to a moral certainty. It was not necessary that this phraseology should be used in every instruction. We

must presume that the jury understood from the instructions given them that they were not at liberty to believe the prosecuting witness unless convinced of the truth of her statements beyond a reasonable doubt. If they did thus believe her, they could not have done otherwise than convict the defendant, for it was upon her uncorroborated testimony alone that conviction was based.

The judgment and order are affirmed.

Burnett, J., and Hart, J., concurred.

[Crim. No. 173. Third Appellate District.—February 26, 1912.]

THE PEOPLE, Respondent, v. JOHN LIGGETT, Appellant.

CRIMINAL LAW—STATUTORY RAPE—INTERCOURSE WITH YOUNG GIRL—SUPPORT OF VERDICT—ADMISSION OF GUILT—TESTIMONY OF PROSECUTRIX.—Where the defendant was charged with the crime of statutory rape, by sexual intercourse with a young girl twelve years of age, of which he was convicted, it is held that evidence which justified the jury in believing that he admitted his guilt, taken together with the testimony of the prosecuting witness, which was direct and unmistakably established the charge, if believed by the jury, amply supported the verdict.

ID.—SURPRISE BY WITNESS FOR PEOPLE—CONTRARY EVIDENCE ON PRELIMINARY EXAMINATION—IMPEACHMENT—RECORD NOT PROVED—IMMATERIAL CROSS-EXAMINATION.—Where a witness for the people gave surprising evidence contrary to her evidence on preliminary examination, the record of such examination is not admissible as independent proof, but merely to lay the foundation for impeachment of her surprising evidence; but where the preliminary examination was not introduced, a question to the witness by defendant on cross-examination as to whether she was told by the parents of the child to testify as she did at the preliminary examination was immaterial.

ID.—EVIDENCE OF PHYSICIAN—INTERCOURSE EFFECTED—RUPTURED HYMEN—VENEREAL INFECTION.—Evidence of the physician who examined the young girl was admissible, for the purpose of showing that sexual intercourse had been effected, that she had a ruptured hymen, and that there were evidences of venereal infection. Each of these circumstances tended to show intercourse.

1A.—EVIDENCE OF PRIOR UNCHASTE REPUTE OR CONDUCT INADMISSIBLE—ABSENCE OF SPECIFIC OFFER AS TO CAUSE FOR VENEREAL INFECTION. Evidence that the prior reputation of the prosecutrix was bad in respect of chastity, or a mere offer to prove prior sexual intercourse of other persons with her, was inadmissible, and could not justify the defendant's intercourse with her while under the age of consent. Nor can such evidence be justified on the ground of the testimony of the physician as to her venereal infection, and that the defendant may now show that someone else "has done that act," in the absence of any specific offer to show that the venereal infection was or may have been caused by some other person than the defendant.

1B.—PROPER INSTRUCTION AS TO TESTIMONY OF PROSECUTING WITNESS. The court properly instructed the jury that "while it is the law that the testimony of the prosecuting witness should be carefully scanned, still this does not mean that such evidence is never sufficient to convict, and if you believe the prosecuting witness, it is your duty to render a verdict of guilty." In this case the act of copulation constituted the offense, and the intent with which the defendant committed the act is immaterial. The prosecuting witness testified to the act, and if the jury believed her, his guilt would necessarily follow.

1C.—INSTRUCTION AS TO REASONABLE DOUBT—ELABORATION UPON DEFINITION OF JUSTICE SHAW NOT APPROVED—REVERSAL NOT JUSTIFIED. While it is not approved that trial courts should attempt any elaborate improvement upon the often approved definition of reasonable doubt given by Chief Justice Shaw, and the elaboration thereupon by the trial court is not an improvement, yet this court finds nothing in it to justify the reversal of the cause.

APPEAL from a judgment of the Superior Court of Yuba County, and from an order denying a new trial. **K. S. Mahon**, Judge presiding.

The facts are stated in the opinion of the court.

W. H. Carlin, for Appellant.

U. S. Webb, Attorney General, and **J. Charles Jones**, Deputy Attorney General, for Respondent.

CHIPMAN, P. J.—Defendant was convicted of the crime of rape alleged to have been committed, about the twentieth day of July, 1911, on a child of the age of twelve years and was sentenced to serve twenty years in the Folsom penitentiary.

Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is claimed that the verdict of guilty rested on the testimony of the prosecuting witness and upon the testimony of her father and mother as to what occurred at a conference with the defendant about August 4th, following the alleged crime. The girl's testimony was direct and unmistakably established the charge, if believed by the jury, which we must assume it was. On August 4, 1911, the parents of the girl, having had their suspicions aroused of defendant's guilt, called him to account in the girl's presence and in the presence of one Mrs. Slaughter. These witnesses do not agree in all particulars as to what then occurred, but there was testimony of what took place at this interview with the defendant which justified the jury in believing that he admitted his guilt. This testimony together with that of the prosecuting witness amply supported the verdict.

Some errors are claimed to have occurred in the rulings of the court to defendant's prejudice, which will be noticed.

At the interview with defendant, above referred to, Mrs. Slaughter was present. Called as a witness for the people, she testified that defendant, when charged with the crime, denied it. When asked whether he at any time during the conversation acknowledged that "he had anything to do with the child," she answered, "Well, I don't remember just exactly that he did." Some further examination of the witness showed to the satisfaction of the court that the district attorney was surprised by her answers and permitted him to call her attention to her testimony at the preliminary examination, at which she testified that defendant admitted his guilt. The court ruled that this testimony could not be used as evidence in the trial, but might be used to show that the district attorney was surprised by the answers of the witness and could be used for purposes of impeachment. Counsel for defendant then asked some questions of the witness concerning what she said to him, previous to the trial, about this same interview with defendant and whether she did not then say to counsel that defendant denied his guilt. It is not quite clear from the record whether or not counsel was laying the ground for the impeachment of the witness or desired to get her statement made out of court in the record. The court called coun-

sel's attention to her testimony in which she had testified that defendant denied his guilt. Counsel for defendant then said: "If that is understood, all right." The question put to the witness on cross-examination as to whether the parents of the prosecuting witness had not told her when she went to the preliminary examination she must testify against defendant was immaterial. The testimony given at the preliminary was not before the jury.

Witness, Dr. Miller, was called by the people and testified that he believed intercourse had been effected. He was asked if he discovered that the child was suffering from any disease. Defendant objected as immaterial and incompetent; that there is no issue involving the disease of the prosecuting witness and there is no evidence that defendant ever had a disease. The court ruled that it was admissible for the same reason that absence of the hymen was shown, that is, as a circumstance tending to show intercourse. The witness answered that "there were evidences of venereal infection." We think the evidence was admissible. In this connection defendant calls attention to the testimony of a character witness, Mr. Pringle, who testified as to the reputation of the prosecuting witness for truth, honesty and integrity, that it was bad. He was asked her reputation for chastity, to which the district attorney objected. Counsel for defendant urged that the testimony of Dr. Miller opened the way to this testimony; that defendant could now show that some other person "has done that act."

"The Court: It does not make any difference whether the child was a moral or immoral child. It does not make any difference what her character was, if she was under the age of sixteen years and this defendant had intercourse with her, he violated the law. It does not make any difference whether she was a pure child or not. She may have been as immoral as it is possible for a child to be. That does not excuse him for doing it.

"Mr. Carlin: If he is guilty.

"The Court: Yes, I assume that he is not guilty. I have a right to assume that. It is no excuse for anyone doing it, however. A man cannot justify himself for doing this crime by showing that the girl was immoral or impure.

"Mr. Carlin: Couldn't he show that probably someone else had done it?

"The Court: No, that does not give the defendant a right to do it.

"Mr. Carlin: We might show that someone else might have done it. Cannot we now account for the conditions which Dr. Miller found, outside of this man? We want to account for that. Well, all right. Exception. We will offer to prove that some person or persons, not the defendant, within a year prior to the fourth day of August, 1911, had sexual intercourse with Mabel Millard.

"The Court: I assume that there had been evidence introduced on that question. The doctor's testimony went to prove that, that she had been tampered with.

"Mr. Carlin: But we offer to prove now that it was someone else and not the defendant that did it.

"The Court: You cannot prove that.

"Mr. Carlin: All right, take the witness. Exception.

"The Court: You can prove that he did not do it but you cannot prove that someone else did it."

We perceive no error in the rulings. In *People v. Currie*, 14 Cal. App. 67, [111 Pac. 108], relied on by defendant, the prosecuting witness had testified that the defendant had sexual intercourse with her on a particular date and that she gave birth to a healthy, perfectly formed child on a particular date, about eight months after the alleged assault on her.

Pregnancy had been shown by the prosecution as evidence of defendant's guilt. It was held error not to allow evidence of her sexual relations with other men to test the truthfulness of this damaging fact of pregnancy. The reputation of the prosecutrix for chastity was immaterial as she was under the age of consent. The colloquy between counsel and the court as to what proof might be made in rebuttal of any inference that defendant was responsible for the diseased condition found by Dr. Miller does not raise the question of the admissibility of such rebuttal evidence. Counsel did not offer any evidence or state that he could produce evidence that this venereal condition was or might have been produced by some person other than defendant. His offer was "that some person or persons, not the defendant, within a year prior to the

fourth day of August, 1911, had sexual intercourse with Mabel Millard." Such evidence was inadmissible.

Error is claimed in giving the following instruction: "While it is the law that the testimony of the prosecuting witness should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; and if you believe the prosecuting witness, it is your duty to render a verdict of guilty. By the law of this state a female child under the age of sixteen years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child by one not her husband will constitute the crime of rape whether with or without the consent of such child, and in this case, if you believe from the evidence beyond a reasonable doubt, that the defendant had sexual connection with the prosecuting witness on or about July 20, 1911, as alleged in the information, and that at the time she was under the age of sixteen years and not the wife of the defendant, then the defendant is guilty of rape and the jury should so find."

Defendant calls attention to the following paragraph—"and if you believe the prosecuting witness it is your duty to render a verdict of guilty"—as the basis of his objection, for the reason that it "singles out a particular witness"; citing *People v. Fernandez*, 4 Cal. App. 314, [87 Pac. 1112]; *People v. Johnson*, 106 Cal. 294, [39 Pac. 622]; *People v. Barker*, 137 Cal. 557, [20 Pac. 617].

The cases cited were instances of assault with intent to commit rape. There the question of intent with which the assault was made was the material element in the cases, and it was held that the court had no right "to put a state of facts to the jury which would bar them from finding the intent to be other than that charged by the information." Said the court: "The defendant may have done all the things charged against him by the evidence of the prosecutrix, and still have been possessed of no intent to commit rape." (*People v. Johnson*, 106 Cal. 294, [39 Pac. 622].) In the case here the act of copulation constituted the offense and the intent with which the defendant committed the act is immaterial. The prosecuting witness testified to the act, and if the jury believed her his guilt must necessarily follow. There was, therefore, no error in the instruction.

The only remaining alleged error pointed out is the refusal of the court to give the defendant's proposed instruction on reasonable doubt. It was refused "because elsewhere given." The instruction given embodies most of the definition of reasonable doubt found in the oft-approved instruction given by Chief Justice Shaw. It also contains some explanatory comments or an elucidation which the learned trial judge conceived proper to aid the jury in their effort to comprehend Judge Shaw's definition. Defendant complains that "The jury was by the instruction practically lectured upon the subject and warned that they should be very careful about this reasonable doubt. In fact, they were practically told that our old friend 'reasonable doubt' is but a figment of the imagination and not to be taken seriously. . . . Without intending to be facetious before this honorable court, we wish to say that it reads like an assault upon an old, a revered and a valued friend." The supreme court has given many cautionary signals warning trial courts against attempting elaborate improvements on a definition which has met with universal approval needing no explanation. We have carefully examined the instruction in question and, while we do not think it an improvement on the oft-given instruction, we find nothing in it to justify the reversal of the cause.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 906. Third Appellate District.—February 26, 1912.]

STOCKTON IRON WORKS, a Corporation, Respondent, v.
BENJAMIN WALTERS, Appellant.

APPEAL FROM ORDER DENYING NEW TRIAL—ERRORS IN PLEADINGS NOT REVIEWABLE.—Where there is no appeal from the judgment, but solely an appeal from an order denying a new trial, alleged error of the court in striking out a counterclaim and portions of the answer of the defendant appealing, which could only be reviewed upon an appeal from the judgment, cannot be considered upon the appeal from such order.

ID.—EFFECT OF CODE AMENDMENT AS TO JUDGMENT-ROLL—SCOPE OF APPEAL FROM ORDER NOT ENLARGED.—Notwithstanding the amendment of 1907 to section 670 of the Code of Procedure makes "all orders striking out any pleading in whole or in part" a part of the judgment-roll, yet such amendment does not enlarge the scope of an appeal solely taken from an order denying a motion for a new trial, upon which no question as to the sufficiency of the pleadings or findings can be reviewed; but only such matters can be considered as are made grounds of the motion, upon which the superior court may grant or deny the same.

ID.—REFUSAL OF LEAVE TO FILE AMENDED PLEADING—INJURY NOT MADE TO APPEAR.—Where the defendant appealing complains that he was denied leave of the court to file a second amended answer and counterclaim, which was requested upon the granting of the motion to strike out, and the overruling of defendant's demurrer to the complaint, but he did not show at the trial, and does not show upon appeal, how he could improve his answer by amendment, no injury is made to appear by the ruling.

ID.—ACTION FOR PRICE OF STEAMER SHAFT FURNISHED—SUFFICIENCY OF SHAFT—CONFLICTING EVIDENCE—RETENTION AND USE—SUPPORT OF VERDICT.—In an action for the agreed price of a steel shaft completely equipped for use in defendant's steamer, where sufficiency of the shaft for the purpose for which it was intended was in controversy, and defendant claimed an absolute agreement of plaintiff to furnish a better shaft, and the evidence upon those questions was substantially conflicting, but it appeared without conflict that defendant had retained and worked the original shaft for sixteen months up to the time of trial, without indications of weakness therein, the verdict for plaintiff for the agreed price was sufficiently supported.

ID.—VERDICT FOR AGREED PRICE "WITHOUT INTEREST"—INTEREST WAIVED BY PLAINTIFF—INSTRUCTION BY CONSENT OF PARTIES—AMENDMENT IN COURT—APPELLANT NOT INJURED.—Where the jury after retirement and deliberation had reached a verdict for the plaintiff for the agreed price, and asked for an instruction as to whether they could "cut out the interest," whereupon the plaintiff expressly waived the interest, and both parties agreed to an instruction that they could dispense with the interest, and the court asked them if they wished to retire, to which the foreman replied that he thought it unnecessary, and the jury immediately amended their verdict by adding to the price agreed upon the words, "without interest," and handed in their verdict so amended in open court, and upon being polled, every juror agreed that it was his verdict, it does not appear that appellant was injured by such amendment in his favor in open court.

Id.—RULINGS UPON EVIDENCE—FURNISHING OF SHAFT—STATEMENTS IN ABSENCE OF DEFENDANT—PAROL EVIDENCE TO VARY CONTRACT.—The court properly ruled that it was immaterial that plaintiff contracted with another company to forge the shaft furnished; that statements out of the presence of the defendant could not bind him; and that the terms of the written contract could not be waived by parol evidence.

Id.—RULINGS NOT PREJUDICIAL.—It is held that no rulings of the court upon evidence were prejudicial, and that the evidence which went to the jury in its entirety fairly presented the theories of the respective parties; that defendant was given every reasonable opportunity to present every material fact at his command, and that it does not appear that plaintiff was permitted to sustain its case by evidence not legally admissible or, at least, which was erroneously admitted to defendant's prejudice.

Id.—PROPER INSTRUCTIONS.—It is held that the instructions, taken as a whole, fairly and correctly presented all of the issues raised by the pleadings.

APPEAL from an order of the Superior Court of San Joaquin County denying a motion for a new trial. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

Arthur L. Levinsky, for Appellant.

C. W. Miller, and R. C. Minor, for Respondent.

CHIPMAN, P. J.—This is an action brought by plaintiff against defendant to recover the sum of \$1,460, alleged to be owing for work performed and materials furnished in the repairing of a steamer called the "H. E. Wright."

In his amended answer defendant admitted that plaintiff performed certain work and furnished certain materials, but denied that they were for the "repair of said steamer 'H. E. Wright,'" but alleges that plaintiff entered into an agreement with defendant whereby plaintiff agreed to construct and place in said steamer a certain steel shaft and its necessary attachments (describing them), "which said shaft was to be a first-class shaft and in a perfect condition, and fit for the purposes for which it was ordered, . . . for the sum of \$1,460"; that, prior to the placing of said shaft in said steamer defendant discovered that the said shaft "was not in

first-class and perfect condition, but, on the contrary, said shaft was improperly made and the same was defective, and had a serious flaw and defect therein" (particularly describing it), by reason of which it was "not reasonably fit for the purposes for which it was ordered and to be used," and defendant refused to accept said shaft; that plaintiff then and there agreed to make a new shaft, "perfect and first class, in the place and stead of said imperfect and defective shaft, and requested defendant to temporarily receive the said defective shaft and its attachments, and to use the same until a new, first class and perfect shaft and its attachments could be made and placed in said steamer"; that, relying on said promise and not otherwise, "defendant received said shaft temporarily and until said new shaft could be made; that at said time plaintiff guaranteed defendant against all loss or damage he might suffer by his use of said imperfect shaft," while it was making for him a new and perfect shaft; that thereafter defendant demanded of plaintiff a new and perfect shaft in place of said defective shaft, but plaintiff refused and ever since has refused to comply with defendant's said demand. Defendant admitted that no part of said \$1,460 or alleged interest has been paid, but denied that the whole or any part thereof is now due or owing from defendant to plaintiff. Paragraph VII of the amended answer is a denial that the said shaft "was of the value of \$1,460, or any other sum of money, whatsoever, or at all, by reason of its imperfect condition and by reason of the said defect aforesaid." Paragraph VIII is an offer or tender of said shaft to plaintiff and a demand that plaintiff "detach and strip said shaft from the wheel and every part and portion of said steamer," and remove the same therefrom "without damage or injury to said steamer." These two paragraphs were, on motion of plaintiff, stricken out of the answer. Defendant, by way of counterclaim, set up a somewhat similar state of facts and claimed damages by reason thereof. On motion of plaintiff this counterclaim was stricken out. The damages claimed rest upon plaintiff's alleged violation of its agreement to furnish defendant a shaft free from the alleged imperfections.

It was claimed by plaintiff at the trial, and admitted by defendant, that the materials and labor referred to in the com-

plaint and answer were furnished pursuant to the following offer and acceptance, which appeared in evidence but were not specifically pleaded:

"May 1, 1909.

"Captain Walters, Steamer H. E. Wright,
"Stockton, Calif.

"Dear Sir: We will furnish you with one 8" hammered steel shaft completely machined with two new forged steel cranks (and divers other fittings as part of said shaft, and not necessary to be enumerated) complete, delivered on our wharf for the sum of \$1460.00.

"(Signed) STOCKTON IRON WORKS."

Defendant replied May 3, 1909, as follows: "We hereby accept your proposal of May 1st for one hammered steel shaft complete and you may proceed to get this shaft out at once.

"(Signed) BENJ. WALTERS."

The cause was tried by a jury and plaintiff had the verdict for the sum of \$1,460, without interest, and judgment passed for plaintiff accordingly.

Defendant appeals from the order denying his motion for a new trial on bill of exceptions.

1. Appellant claims that the court erred in striking out his counterclaim and portions of his answer and also in refusing his application for leave to amend. Respondent makes the point that, there being no appeal from the judgment, the rulings of the court cannot be reviewed; citing *Spence v. Scott*, 97 Cal. 181, [31 Pac. 52]; *Sutton v. Stephan*, 101 Cal. 547, [36 Pac. 106]; *Mock v. Santa Rosa*, 126 Cal. 330, [58 Pac. 826]. In each of those cases the appeal was on the judgment-roll without a statement or bill of exceptions. The record showed in each case a motion to strike out portions of defendant's answer and the rulings thereon. The court held that the proceedings formed no part of the judgment-roll and, there being no bill of exceptions or statement, the rulings could not be reviewed. We have here, however, the judgment-roll and bill of exceptions, in both of which the proceedings on the motion are set forth, and it is contended by appellant that the cases cited do not apply. Section 670, Code of Civil Procedure, was amended in 1907 (Stats. 1907, p. 720), making "all orders striking out any pleading in whole or in part" part of the judgment-roll. But the amendment

does not enlarge the scope of the appeal from the order denying a motion for new trial. Questions relating to the sufficiency of the complaint, rulings upon demurrers and sufficiency of the findings to support the judgment cannot be considered upon an appeal from an order denying a new trial. (*Great Western Gold M. Co. v. Chambers*, 153 Cal. 307, [95 Pac. 151].) Only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion. (*Crescent etc. Co. v. United Upholsterers*, 153 Cal. 433, [95 Pac. 871].) "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." (Code Civ. Proc., sec. 656.) It is pointed out in *Hayne on New Trial*, Revised Edition, page 5 et seq., that the statutory definition consists of several elements: 1. That a new trial is a re-examination of an *issue of fact*; 2. That the re-examination of the *issue of fact must be in the same court*; 3. That the re-examination of the issue of fact must take place *after a new trial and decision*. The author says: "The word 'trial' as used in the definition under consideration refers to an investigation of the issues of fact raised by the pleadings." The granting of a motion to strike out parts or all of a pleading is not one of the grounds for new trial. (Code Civ. Proc., sec. 657.) Since "all orders striking out any pleading in whole or in part" (Code Civ. Proc., sec. 670) are part of the judgment-roll, it would seem no longer necessary to present the matter by bill of exceptions, as was the case when such orders formed no part of the judgment-roll (cases *supra*); but however this may be, we are satisfied that such orders can only be reviewed on appeal from the judgment.

2. Defendant complains that he was denied leave to file a second amended answer and counterclaim. The request was made upon the granting of a motion to strike out and the overruling of defendant's demurrer to the complaint. Defendant did not, at the trial, nor does he now, suggest why he desired to amend his answer nor show that he could improve it by amendment. In short, no injury is made to appear by the ruling.

3. It is urged that the verdict was contrary to the evidence. As is quite often the case, appellant rests his argument largely on testimony adduced in support of his theory, ignoring the

fact that this testimony was in conflict with that submitted by the plaintiff or, if not in conflict, might have been discredited by the jury. We cannot undertake a full review of the evidence, making, as it does, a somewhat voluminous record. Briefly stated, there was evidence that when the shaft was delivered at plaintiff's wharf and after it had been put on timbers aboard the steamer, defendant discovered in it what he regarded as a serious defect, impairing its strength and safety, and refused to accept it. This defect consisted in what is technically called a "pipe"—a small hole in the center of the end of the shaft, "where the crank is shrunk on," which was explored with a wire about the size of a knitting needle or ordinary hair pin to the depth of nearly nine inches. A wire of the size of a twenty-penny wire nail was inserted about five and one-half inches. There was considerable discussion between defendant and his engineer and representatives of plaintiff as to the effect of this blemish, which resulted in defendant's installing the shaft. He claims that he consented upon the conditions set forth in his answer. As to just what representations were made there is much conflict. There was evidence that defendant was given assurances that the shaft was not weakened by this defect; that it was fit and would do the work it was intended for; that plaintiff would guarantee it for a year, and that if after trial for a reasonable time it proved unfit, plaintiff would replace it with a new one. Defendant attempted to show that plaintiff conceded the unfitness of the shaft and promised unconditionally to replace it with a new one, but plaintiff's witnesses denied this and testified that no such admission and no such promise was made. Witnesses for the plaintiff, who showed their qualifications as experts, testified that this so-called "pipe" had no appreciable effect on the shaft to weaken it or impair its usefulness or length of service. Witness Pennington testified: "I have had a lot of experience in these things, what is a good and what is not a good shaft. I have made shafts that go to sea, and for vessels that are inland shafts, such as the steamer 'H. E. Wright.' I saw the shaft here in the steamer 'H. E. Wright' in Stockton. I consider the shaft was in perfect condition. Of course there was in one end what we call a 'pipe,' probably caused by lapping from drawing out the end of the shaft. This pipe I don't think a

particle of detriment to the shaft. I thought the shaft was a perfect shaft for the work it was intended for." He was asked the difference between a pipe and a crack and answered: "Well, a crack is something on the surface, this was something in the center of the shaft that may have been caused by the hammer." He testified that this was not an unusual condition and "did not impair its usefulness at all for the purposes for which it was intended." There was much testimony of like import. It appeared that the shaft had been in constant use for about sixteen months at the time of the trial and it showed no indications of weakness. We think there was sufficient evidence to justify the verdict.

4. Some time after the case had been given to the jury they came into the courtroom and, on being asked if they had agreed upon a verdict, the foreman answered: "Not exactly, your Honor. We want instruction in regard to the interest, whether the jury could cut out the interest, or have anything to do with the interest. The printed instruction says interest from a certain date." The court replied that all it could do was to call attention to the instructions. Counsel for plaintiff thereupon waived the interest and, with consent of both parties, the court instructed the jury orally that inasmuch as interest had been waived in open court, "if the jury see fit they may cut the interest out of the verdict." The court then asked the jury if they desired to return to the jury-room. The foreman answered: "I don't think it would be necessary." After "a short pause" the jury passed up the verdict for the sum of \$1,460 without interest, and on being polled answered that it was their verdict. The error now claimed is that the verdict was rendered "without retiring from the courtroom to find a verdict." Apparently the jury had reached a conclusion before coming into the courtroom except as to the item of interest, and when plaintiff waived that item, as it had a right to do, it was competent for the jury to return their verdict without retiring from the courtroom. Besides, defendant has not shown, inferentially or otherwise, that he was injured by the conduct of the jury. Apparently he profited by the alleged error.

5. Defendant assigns fifty or more errors in rulings upon the evidence. Some of these are given scant notice by counsel; many of them are mere references to pages of the tran-

script and the number of the exception there shown, with no explanatory statement in the brief. Others appear to be particularly relied upon and such of these latter as seem to call for comment will be noticed.

Witness Tretheway, president of plaintiff company, was asked whether the articles, at the time of delivery at plaintiff's wharf, were "in the condition required by the proposal and offer of acceptance." He answered "Yes," after which defendant objected as leading, suggestive and a conclusion. The court allowed the answer to stand. The objection should have been sustained if it had been made in time and the answer should have been stricken out if defendant had asked to have it done. The principal issue involved the condition of the shaft at the time of its delivery and whether it met the requirements of the proposal and acceptance. But this whole subject was later gone into very fully by both sides and in great detail. We think the error was without prejudice.

6. It appeared that plaintiff contracted with Pennington & Co., of San Francisco, to forge the shaft. On cross-examination Tretheway was asked if he informed defendant of this fact and, on objection of plaintiff as immaterial, the court so ruled. Plaintiff's offer was to "furnish" a shaft such as was described, not personally to manufacture it. The fact was immaterial.

7. Tretheway had testified, on cross-examination, that his foreman had informed him that objection was made to the shaft; that he sent for Pennington (one of the firm of Pennington & Co.) and they together went on board the vessel where the shaft then was, and there met her engineer and Captain Curry, her commander; that they tried to convince Captain Curry and the engineer that the shaft was in every way suitable for the work. "Q. Then the engineer and Captain Curry had, before or at that time, informed you the shaft was not fit for the purposes for which it had been ordered?" The court sustained plaintiff's objection to the question. It appeared that defendant was not present at this meeting with Curry and the engineer. The court had previously ruled that what was done by the parties present could be shown, but that the declarations made in the absence of defendant were not admissible and defendant declined to be bound by what was said in his absence. Plaintiff objected because neither the en-

gineer nor Curry had qualified as experts, and the question was calculated to get from them by indirection what they could not testify to directly. The tendency of the question was to get before the jury an opinion which neither Curry nor the engineer was qualified to give.

8. The question was asked by defendant of witness Burnett, who was an engineer of experience, but did not show expert knowledge of shafts, whether this particular shaft was "a safe or unsafe shaft." Defendant admitted that witness was not an expert, but contended that expert knowledge was not necessary to qualify the witness to give an opinion upon the safety of this shaft. We do not agree with defendant in this contention. It is argued that later on the court allowed plaintiff to submit expert testimony by witness Burns, who, it is alleged, admitted that he was not an expert. Of course, any subsequent error of the court cannot affect the question now before us. It seems, however, that the court, after Burns was examined as to his qualifications, held that he was qualified to give an opinion as to the effect a so-called "pipe" would have on such a shaft as is in question.

9. Defendant's witness, Purington, was asked what effect would this shaft have upon the steamer if it should break. An objection by plaintiff was sustained. Purington had never worked a shaft on a steamboat, though he had expert knowledge in making shafts and could and did testify as to the effect a "pipe" would have in a shaft. We cannot see that any answer he might have made would meet any issue in the case. The effect which the breaking of the shaft might have would depend upon so many other facts that any answer would be purely speculative. There was no issue as to the damage which might result from the breaking of the shaft.

10. On cross-examination this witness was allowed to answer certain questions put by plaintiff as to whether after a year's use any defect in the shaft would be likely to develop itself. Defendant objected on the ground that the witness had not qualified except to a limited extent as an expert. The answers were favorable to defendant and hence he was not injured.

11. The cross-examination of defendant's witness, Curry, as to what Pennington said when he and Tretheway met Curry on the steamer, was fairly within the rule which permits much

latitude in testing the recollection of the witness as to what took place on the occasion referred to.

12. Witness Donaher was defendant's engineer who was present when Pennington and Tretheway went aboard the steamer to examine the shaft. He was one of the class of witnesses, frequently met with, who wander at will and volunteer irresponsible answers. In his cross-examination by plaintiff he several times exhibited this disposition and, on motion of plaintiff, his answers were stricken out. We discover no error in these instances. On redirect, an objection to a leading question was sustained. No error is apparent. His answer: "We had a defective shaft, and always expected and looked for it to break; even when I would go to bed I would think about it," was properly stricken out.

13. Defendant was called as a witness and was asked to state what changes, if any, were made in the contract at the time it was signed. The court properly refused to allow the terms of the written contract to be varied by parol.

14. Evidence of defendant's ability to pay for the shaft at any time was immaterial. His ability was not questioned; it was rather his disposition to pay.

15. Whether or not defendant had entered into a new contract with anyone for a shaft was not material.

16. Witness Gavigan, for plaintiff in rebuttal, was foreman of plaintiff's works and was quite fully examined as to his expert knowledge and capacity to judge of the effect this "pipe" would have and whether it weakened the shaft. The court admitted his testimony, and we cannot say that its ruling was error.

17. Witness Pennington was called in rebuttal by plaintiff and was asked whether the condition under which he found the shaft was an unusual condition and, over defendant's objection, answered: "Not at all. In my judgment it did not impair its usefulness at all for the purpose for which it was intended." He had qualified as an expert foundryman in making shafts and was qualified to testify as to whether the condition of this shaft was an unusual one.

We think it safe to say that the evidence which went to the jury, taken in its entirety, fairly presented the theories of the respective parties and was free from prejudicial error. Defendant presented his defense with zeal and ability and, it

seems to us, was given every reasonable opportunity to place before the jury every material fact at his command. Nor can we discover that plaintiff was permitted to sustain its case by evidence not legally admissible or, at least, which was erroneously admitted to defendant's prejudice.

18. The court instructed the jury that if they believed from the evidence that the articles were furnished under the written offer of plaintiff and written acceptance of defendant, then "these two papers constitute a contract between the parties, and the plaintiff is entitled to recover the amount sued for herein, unless your minds are satisfied by a preponderance of the evidence that the said articles were not reasonably fit for the purposes intended." The court charged the jury that "a person who sells machinery manufactured by him is held by law to impliedly warrant such machinery to be reasonably fit for the purpose for which it was intended," and that "there is no legal requirement that such machinery should be perfect, unless it be so expressly agreed between the buyer and seller"; and further, that "all that is required, in the absence of an express agreement to the contrary, is that such machinery is reasonably fit for the purpose for which it is intended." Also that "an imperfection in such machinery that does not render it reasonably unfit for the use for which it was intended will be insufficient to justify the refusal of the buyer of such machinery to accept and pay for the same, and in this case, if you find from the evidence that the machinery sold by plaintiff to defendant was reasonably fit for the purposes for which it was intended, then you must find for the plaintiff." Defendant complains that, under these instructions, he was compelled, by a preponderance of the evidence, to show that the shaft was not reasonably fit, and that when he showed that there was an imperfection, the burden at once shifted to plaintiff to show, by preponderance of the evidence, that the shaft was reasonably fit for the purposes for which it was intended. It is also claimed as error in instructing the jury that, unless expressly so agreed, there was no legal requirement of plaintiff to furnish a perfect shaft, defendant claiming that, under section 1768 of the Civil Code, it was plaintiff's duty to furnish a "perfect" shaft. Defendant made the alleged imperfection in the shaft the subject of his defense in his answer, and his

evidence was directed in a large degree to that issue. It was met by plaintiff in rebuttal, and it seems to us that the court did not, although it might properly have done so, instruct the jury that the burden of proof on this issue was on defendant. The court correctly stated the duty of plaintiff, as provided by section 1770 of the Civil Code, that is, that it must appear that the machinery was reasonably fit for the purpose for which it was intended. On the issue raised by defendant the jury were instructed to be guided by the preponderance of the evidence, as to which there was much conflict. In modifying one of defendant's proposed instructions, which was framed in view of section 1778, Civil Code, to make it conform to the rule stated in section 1770 of the same code, the court did not err.

The court did not err in instructing the jury that statements made by Pennington and Tretheway, at the time they met Captain Curry on the steamer, "cannot be received as going to the establishment of any agreement between the parties touching a new shaft or any guaranty or promise concerning it." Defendant was not present and no one there at the time had any authority to speak or act for him in the making of any contract. The court did not take the evidence away from the jury any further than this.

The instructions, taken as a whole, fairly and correctly, we think, presented all the issues raised by the pleadings.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1072. Second Appellate District.—February 27, 1912.]

C. M. APPLESTILL, Petitioner-Respondent, v. W. D. GARY, as Auditor of the County of Imperial, etc., Appellant.

COUNTY SHERIFF—AOT CLEARLY INCREASING COMPENSATION OF INCUMBENT—SALARIES OF DEPUTIES—CHANGE OF CLASS—VIOLATION OF CONSTITUTION.—If upon comparison of an act fixing the original compensation of the sheriff of a county of a specified class, and an act increasing his compensation during his term, by the addition of salaries of an under-sheriff and deputy sheriff, under an increased classification of such county, it clearly appears that the change in

compensation effects an increase thereof, then to apply such increase to the incumbent would violate section 9 of article XI of the constitution, forbidding such increase "during his term of office."

ID.—EFFECT OF UNCERTAINTY AS TO INCREASE OF COMPENSATION—CLEAR DECLARATION OF LEGISLATURE TO CONTRARY—CONCLUSIVENESS.—If, in an act changing the compensation of a county officer during his term, the mode thereof is such that it cannot be determined by a comparison of such act with the former act under which he was elected whether such change does or does not result in an increase of the compensation, a clear declaration by the legislature in the later act that it does not increase the compensation would be conclusive of the fact so declared, and the later act would be applicable to the incumbent when it goes into effect, whether it takes effect after sixty days from its passage or immediately.

ID.—MERE DECLARATION THAT CHANGING ACT TAKES EFFECT IMMEDIATELY—CONSTRUCTION.—A mere declaration in the act changing the compensation of the county sheriff during his term of office that "this act shall take effect immediately" cannot be construed as a legislative declaration to the effect that it did not constitute an increase, so as to make it applicable to the incumbent when it goes into effect, notwithstanding some uncertainty as to whether an increase of the compensation can be determined by a comparison of the two acts. In the absence of an express declaration, it is to be inferred that an increase was contemplated, and that it was intended to apply prospectively only.

ID.—CHANGING ACT INCLUSIVE OF OTHER COUNTY OFFICERS WHOSE SALARIES COULD NOT BE CHANGED—PROSPECTIVE CONSTRUCTION OF STATUTE.—Where the act purporting to change the compensation of the sheriff also purports to change the compensation of other county officers whose salaries could not be changed during their terms without violating the constitution, the true construction of the act changing the compensation is to treat all of its provisions alike; and, knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequently to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments, which may or may not have the effect of increasing compensation, were likewise intended to operate only in favor of or against officers to be thereafter elected.

APPEAL from an order of the Superior Court of Imperial County issuing a peremptory writ of mandate to the county auditor thereof. George H. Hutton, Judge presiding.

The facts are stated in the opinion of the court.

Phil D. Swing, District Attorney, for Appellant.

Conkling & Brown, for Respondent.

SHAW, J.—Appeal from an order issuing a peremptory writ of mandate commanding defendant, as auditor of Imperial county, to issue to plaintiff his warrant upon the county treasurer for the sum of \$70.16, claimed to be due petitioner as salary for the month of May, 1911, as deputy sheriff of said county, to which office he had been appointed on May 3, 1911, by Mobley Meadows, sheriff of Imperial county.

When Meadows was elected sheriff, on November 8, 1910, Imperial county was in the thirty-sixth-one-half class. (Pol. Code, sec. 4265a.) The compensation fixed by law for the sheriffs of such counties was the sum of \$5,000 and all mileage now allowed by law. (Pol. Code, secs. 4265a, 4300b.) By act approved February 28, 1911, [Stats. 1911, p. 96], the several counties of the state were reclassified according to population for the purpose of regulating the compensation of officers. As so classified Imperial county was declared to be a county of the thirty-sixth class, and by an act of the legislature, approved May 1, 1911, the compensation of the sheriff in the counties of such class was fixed at \$5,000 per annum, and all commissions, fees and mileage for the service of papers and process issued without his county; in addition to which, it was provided that he should have an under-sheriff at a salary of \$1,500 per annum, and a court deputy at a salary of \$900 per annum, both of whom should be appointed by the sheriff and the salaries of whom were made a charge upon the county treasury.

Respondent concedes that if upon a comparison of the two acts it appears that the change in compensation effects an increase thereof, then to apply it to an incumbent would be obnoxious to section 9, article XI, of the constitution. If no change other than the allowance of deputies had been made, such fact, under the decision in *Dougherty v. Austin*, 94 Cal. 601, [16 L. R. A. 161, 28 Pac. 834, 29 Pac. 1092], would constitute an increase in compensation. Whether the salaries of deputies and the amount of fees and commissions on business arising outside his county, allowed in lieu of mileage on county business, and of which he is deprived, effected an increase in compensation, cannot be determined by a comparison of the two acts. It is therefore insisted that, inasmuch

as it does not appear that the effect of the amendment was to increase the compensation, and since the legislature has by section 8 of the act declared it should take effect immediately, which as to the compensation of sheriffs of counties of the thirty-sixth class it could not do, except upon the hypothesis that the legislature had determined it did not cause an increase, a conclusive presumption arises that, by reason of such urgency clause alone, it did so determine, and thereby expressed an intent that the change should operate upon incumbents; that in the absence of the existence of such fact the declaration would not have been made. There is no doubt, we think, that where an act changes the compensation of a county officer, the mode being such that it cannot be determined by a comparison whether such act does or does not result in an increase thereof, a declaration therein by the legislature that it does not increase the incumbent's compensation would be conclusive of the fact so declared and the act would be applicable to incumbents when the law went into effect, whether at the expiration of sixty days from its passage or immediately by virtue of an urgency clause. Such appears to have been the opinion of the supreme court expressed by Angellotti, J., in *Crockett v. Mathews*, 157 Cal. 157, [106 Pac. 575], where the legislature in changing the compensation of officers declared that, "except as to subdivisions 13 and 15, this act shall not take effect until the expiration of the present term of officers hereinabove enumerated." These subdivisions related to justices of the peace and constables, as to whom it was held the act changing their compensation took effect and became operative sixty days after its passage (there being no earlier date fixed). The only question, therefore, is whether the declaration that "this act shall take effect immediately" should be construed as a declaration to the effect that it did not constitute an increase and should immediately apply to the incumbents of offices whose compensation was so changed.

The facts of the case at bar are almost identical with those involved in that of *Smith v. Mathews*, 155 Cal. 752, [103 Pac. 199], and the opinion there rendered must be deemed decisive of the points raised in this case. The subject of the amendatory act (Stats. 1911, p. 1262) is the amendment of both section 4236, Political Code, relating to counties of the seventh

class, and section 4265, Political Code, relating to counties of the thirty-sixth class. That the result of the amendment is to increase the compensation of some of the county officers mentioned therein is clearly disclosed by comparison. As to such officers, section 9, article XI of the constitution presents an insurmountable barrier to the act taking immediate effect, in the sense of being operative as to such officers. Clearly, it was not the intent of the legislature to increase the compensation of such officials in violation of the constitution by merely declaring that the act should take effect immediately. Without such declaration, it would take effect in sixty days; hence, such provision, as said by Beatty, C. J., is a false quantity in the consideration of the question. "Since the clause putting the statute into immediate effect clearly does not mean all that it says, it falls short of its literal import. If it was not intended to put in immediate operation provisions raising salaries, upon what ground are we to hold that it was intended to have immediate operation in those instances where it changes the compensation attached to an office without disclosing whether the change effects an increase or reduction, and where, as far as the court can see, it is as likely to be an increase as a reduction? If in one case the old law continues to operate, why not in the other?" (*Smith v. Mathews*, 155 Cal. 752, [103 Pac. 199].) Like the case from which we have just quoted, the urgency clause may be accounted for by the fact that the act in question (Pol. Code, subd. 17, sec. 4236) gives the board of supervisors power to authorize incumbents to employ special clerical help at a compensation to be fixed by such board, when deemed necessary to bring the work of the office down to date in case of neglect in that regard by the incumbent's predecessor. This provision is entirely independent of the provisions changing the salaries of officers. In our opinion, the true construction of the act "is to treat all its provisions alike, and, knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequent to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments which may or may not have the effect of increasing compensation were likewise intended to operate only in favor of or against officers to be thereafter elected." The mere declaration that the act should

take effect immediately cannot, under the facts presented, if in any case, be construed as a declaration on the part of the legislature that no increase results from the change and that it shall apply immediately to the present incumbents. In the absence of such declaration, quoting from the concurring opinion in the Smith case, "it is to be inferred that an increase was contemplated and that it was intended to apply prospectively only."

The order granting the peremptory writ is reversed, with instructions to the court to make an order denying petitioner's application.

Allen, P. J., and James, J., concurred.

[Civ. No. 955. First Appellate District.—February 29, 1912.]

DELIA TALBOT and THOMAS TALBOT, Her Husband,
Respondents, v. A. GINOCCHIO, Appellant.

ACTION FOR DAMAGES—NEGLIGENT DRIVING OF TEAM—PLEADING AND FINDING OF ULTIMATE FACT.—In an action to recover damages for personal injuries resulting from the negligent driving of a team by defendant's servant against the person of the plaintiff, such negligence is the ultimate fact to be pleaded, and is not a legal conclusion; and a finding that "the servant and employee of the defendant in charge of said horse and wagon was driving the same carelessly and negligently" is a finding of an ultimate fact, and not upon a mixed question of law and fact, and is unobjectionable.

Id.—SUPPORT OF FINDINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—COLLISION AT LEFT CURB OF STREET—INCREASE OF SPEED—PRUDENCE OF PLAINTIFF.—Where there is evidence to show that plaintiff was prudently crossing the street, from the right side to the left, after looking to see if there were any teams approaching and seeing none, was about to step from the left curb to the sidewalk, when the driver of defendant's horse and wagon approached with increasing speed on the left side of the street and struck plaintiff down and seriously injured her before she could reach the left sidewalk, it is held that the findings that the defendant's employee was negligently driving the horse and wagon and that such negligence caused the injury, and that the plaintiff was not guilty of contributory negligence, were sufficiently supported.

ID.—RULE IN CASE OF CONFLICTING EVIDENCE OR DOUBT FROM INFERENCE
—**QUESTION OF FACT.**—Under the rule that, when the evidence is conflicting, or when reasonable men might differ as to the inference which ought to be drawn from the undisputed or proven facts, the question of negligence or contributory negligence is one of fact for the jury and the trial court, it is held that the appellate court cannot say that the trial court was not justified in its findings against the defendant and in favor of the plaintiff injured.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Edwin T. McMurray, for Appellant.

Dudley D. Sales, for Respondents.

HALL, J.—Plaintiffs brought this action to recover damages for personal injuries received by plaintiff, Delia Talbot, from the negligence of defendant, committed by a servant of defendant in driving a team against the person of said plaintiff. The cause was tried by the court without a jury, and resulted in a judgment in favor of plaintiffs in the sum of \$350. From this judgment and the order denying defendant's motion for a new trial an appeal was in due time taken to this court.

It is urged that the findings are insufficient to support the judgment in that, as it is claimed, the "finding that 'the servant and employee of defendant in charge of said horse and wagon was driving the same carelessly and negligently' is a finding upon a mixed question of law and fact."

Appellant cites no authority in support of this assertion.

In an action to recover damages resulting from the negligence of the defendant "a general allegation of negligence upon the part of defendant is sufficient." In such a case "The negligence is the ultimate fact to be pleaded, and is not a legal conclusion." (*House v. Meyer*, 100 Cal. 592, [35 Pac. 308].)

The finding in question is of an ultimate fact, and is unobjectionable.

The main and only other contention of appellant is that the evidence does not show that appellant's employee was guilty of any negligence in driving the team that struck plaintiff, but that she was guilty of contributory negligence that resulted in her injuries.

There is ample evidence in the record tending to establish the following as the essential facts in the case:

Upon the day in question plaintiff, Mrs. Talbot, with her friend, Mrs. Leahey, at about 4 o'clock in the afternoon, approached Point Lobos avenue from the north along the east side of Third avenue. Upon reaching the northerly side of Point Lobos avenue the two ladies turned and crossed to the westerly side of Third avenue over the crossing upon the northerly side of Point Lobos avenue. Upon reaching the westerly side of Third avenue they started to cross Point Lobos avenue from the north to the south side thereof over the crossing at the westerly side of Third avenue. As they stepped from the sidewalk to the roadway or street proper they, especially Mrs. Talbot, looked up and down Point Lobos avenue to ascertain whether any cars or other vehicles were approaching, and saw the appellant's team approaching at a walk or slow jog, westerly, along the northerly side of Point Lobos avenue, between the northerly car track upon said avenue and the northerly curb line thereof and just approaching the east line of Third avenue. Deeming that she could cross in perfect safety—as indeed she undoubtedly could if the team had continued in its then course and pace—Mrs. Talbot and her friend continued their way across Point Lobos avenue along the usual path or crossing. Just before getting across the avenue plaintiff again observed the team and saw that it had changed its course and was crossing to the southerly side of Point Lobos avenue, within the lines of Third avenue, as if to pass to the south along Third avenue. Plaintiff, still apprehending no danger, continued in her course, and just as she was stepping to the southerly curb of Point Lobos avenue, following Mrs. Leahey, who was in advance, she was struck by the pole or shaft of the wagon and thrown to the ground and injured.

There is testimony given by Mrs. Leahey that as the horse neared plaintiff its speed was increased.

The driver of the horse and wagon testified that he did not see the ladies until his horse was within about five feet of them, at which time he also said they were on his southerly side. He was driving to the stable of his employer, situate on the southerly side of Point Lobos avenue about seventy-five feet westerly from Third avenue.

From the foregoing *résumé* of the facts, which find support in the evidence in the record most favorable to the respondents, we do not think that it can be doubted but that the trial court was justified in finding that the servant of defendant was guilty of negligence in the driving of the horse and wagon. It is manifest from his own testimony that as he swung across Point Lobos avenue from the north to the south side thereof, and approached the crossing at the westerly line of Third avenue, he gave little heed to what might be in front of him. He did not see the ladies until they had reached a point to the south of his path, in other words, not until they had substantially passed in front of his horse, for notwithstanding that he says they were crossing from the south there can be no doubt but they were crossing from the north to the south side of the street when the accident occurred. The court might well believe from the evidence that the driver was improperly upon the left-hand side of the road, and that he increased or allowed an increase of the speed of his team as the ladies were practically passing in front of his team and but a few feet away.

Under the rule that when the evidence is conflicting, or when reasonable men might differ as to the inference which ought to be drawn from the undisputed or proven facts, the question of negligence or contributory negligence is one of fact for the jury or trial court and is not one of law (*Davies v. Oceanic Steamship Co.*, 89 Cal. 280, [26 Pac. 827]; *Reddington v. Postal Tel. Co.*, 107 Cal. 317, [48 Am. St. Rep. 132, 40 Pac. 432]; *Wikberg v. Olson Co.*, 138 Cal. 479, [71 Pac. 511]), we certainly cannot say that the court was not justified in finding that appellant's servant was guilty of negligence in driving the team, and that such negligence caused the injury to plaintiff.

Under the same rule we cannot say that the finding that plaintiff was not guilty of any contributory negligence is not supported by the evidence. She was crossing at the proper

place, twice looked to see if danger threatened, believed that she could safely cross, and the court may well have believed that she could and would have crossed in safety except that the driver increased the speed of his team just preceding the collision. As it was, she was only struck just as she was in the act of stepping to the curb. (See *McKernan v. Los Angeles Gas & Elec. Co.*, 16 Cal. App. 280, [116 Pac. 677], and *Clark v. Bennett*, 123 Cal. 275, [55 Pac. 908].)

The judgment and order are affirmed.

Kerrigan, J., and Lennon, P. J., concurred.

[Civ. No. 1023. Second Appellate District.—February 29, 1912.]

LOUISE MAY GOODHART, Appellant, v. THE MISSION PUBLISHING COMPANY, a Corporation, Respondent.

ACTION FOR MONEY OBTAINED BY FRAUD—NEWSPAPER SUBSCRIPTION PRIZE CONTEST—FALSE STATEMENT AS TO CONDITION OF VOTES—GUARANTY—PUBLIC POLICY.—An action against a publishing company engaged in a newspaper subscription prize contest, to recover the sum of \$300 paid to the defendant, on the ground that it was obtained by the fraud of its agents in charge of the contest, by falsely stating the condition of the votes upon the first prize, and that such payment would secure subscriptions sufficient to obtain the first prize over all contestants, and that it would be guaranteed, and that if the plaintiff did not obtain it the money would be refunded by the defendant, is tenable, and cannot be resisted on the ground that the contract was in fraud of the rights of other contestants, and against public policy.

ID.—GOOD FAITH OF PLAINTIFF—ABSENCE OF FRAUD UPON OTHER CONTESTANTS—RELIANCE UPON AGREEMENT TO REFUND.—Where it appears that the plaintiff is a young girl who acted in entire good faith, and without any intention to do otherwise than to secure for herself sufficient votes by newspaper subscriptions to obtain the first prize in a manner which would be available to any other contestant, there is an entire absence of fraud upon her part upon the rights of other contestants. Nor could the agreement to refund the money, if the first prize were not obtained, be in fraud of the rights of other contestants, though it is an agreement upon which the plaintiff might well have relied.

ID.—GENERAL VERDICT FOR PLAINTIFF—SPECIAL FINDINGS BASED ON AGREEMENT WITH SUBSCRIPTION AGENT—IMPROPER JUDGMENT ON SPECIAL FINDINGS.—Where the jury rendered a general verdict for plaintiff for the sum of \$300 sued for, and also rendered a special verdict in affirmative response to special interrogatories as to all of the specific terms agreed to between the plaintiff and the agent of the defendant in charge of the subscription prize contest, and that plaintiff delivered the money in reliance upon that agreement, it is held that there is no inconsistency between the general and special verdicts, and that the court erred in granting defendant's motion for judgment on the special verdict.

ID.—IMMATERIAL CONDITIONAL ELEMENT IN CONTRACT WITH AGENT.—The further element which appears to have entered into the agreement with the agent that in the event that plaintiff had not enough votes to secure her the first prize, defendant, "if necessary for that purpose, would deliver enough votes to insure her the first prize," may be rejected from consideration, since, as determined by the special findings, the damage accrued to plaintiff by reason of the false representations as to the condition of the vote at the time she paid the \$300 to the defendant.

ID.—CLAIM OF DEFENDANT AS TO UNAUTHORIZED ACT OF AGENT—CONCLUSIVENESS—APPEAL OF PLAINTIFF.—The averment of defendant that the agents who received from the plaintiff the \$300 were not acting within the limits of their authority when they made the representations to the plaintiff, as charged, presents a question which it is held was settled adversely to the defendant by the verdict of the jury, and is not open to review in its favor on appeal of plaintiff from the judgment rendered for defendant on the special findings.

ID.—CLAIM OF UNLAWFUL CONTRACT—ESSENTIALS TO DENIAL OF RELIEF—CLAIM NOT SUSTAINED.—Before relief can be denied because of the unlawful nature of a contract, whereby some rule of public policy is claimed to have been violated, it must appear clearly that the case comes within that class, and that the agreement of the parties in its essential obligations is tainted from improper motives. It is held that the case, as it is exhibited by this record, is not one of that kind.

APPEAL from a judgment of the Superior Court of Riverside County. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

Miguel Estudillo, for Appellant.

H. L. Carnahan, for Respondent.

JAMES, J.—This is an appeal by the plaintiff from a judgment entered in favor of defendant. Upon the trial of the case by a jury, verdict in favor of plaintiff for the sum of \$300 was returned, together with findings on special questions of fact submitted by the court. Defendant thereafter moved for judgment in its favor on the special findings, which motion was granted, and the judgment appealed from was then entered.

Plaintiff alleged in her complaint that in October, 1909, the Mission Publishing Company of Riverside, being the publishers of the "Morning Mission" and the "Riverside Enterprise," offered prizes to young women who would secure the largest number of votes through a subscription contest; that the prizes were of different value and seven in number; that the defendant represented that the contest would be conducted in a fair and honest manner; that it was not so conducted; that on or about the thirteenth day of November, 1909, and during the course of the contest, defendant, through its agents, stated to plaintiff that they knew how many votes the other contestants had, and also that they knew that the other contestants had done everything that possibly could be done; that neither of them had any more money to pay to the defendant for more votes, and that the payment of \$300 by plaintiff to defendant would give plaintiff 600,000 more votes than the highest contestant. It was further alleged that the agents and employees of defendant were sharp and shrewd men, and that plaintiff was a young girl, eighteen years of age, inexperienced, and that the representations last mentioned were made with intent to deceive and defraud her, and that she was deceived thereby and induced to pay to the defendant the sum of \$300; that in truth, at the time said representations were made, the highest contestant did have then, over and above all of the votes which plaintiff was entitled to, including the 600,000 votes to be secured by the payment of \$300, more than 200,000 votes, and that three of the other contestants also had more votes than plaintiff had, notwithstanding the payment of \$300 and the votes awarded to her therefor. The prayer was for damages in the sum of \$500. Defendant, after specifically denying the allegations of plaintiff's complaint, alleged that all of the representations as charged by the complaint were made by the employees of defendant, but that such employees

were not authorized or empowered to make any such representations; and further, that said employees had guaranteed that plaintiff would get the first prize; that in the event she did not so secure it, defendant would repay to her the sum of \$300. It was admitted by the answer that the defendant had received the sum of \$300. Upon the case being given to the jury, four special issues of fact were submitted for determination, all of which were answered in the affirmative by the jury. The substance of all of the questions is fairly expressed in the first thereof, which is as follows: "Did the agent or employee of defendant make the following representations to plaintiff, to wit: That if she, the plaintiff, would deliver \$300 in cash to defendant, it would guarantee her that she would be awarded the Ford automobile; that the defendant, its agents and employees, knew how many votes the other contestants, to wit, Leona Jeffreys and Marguerite Peters, had, and also knew that the other contestants, Leona Jeffreys and Marguerite Peters, had done everything that could possibly be done, and that neither of them had any more money to pay defendant; that the payment of \$300 would give 600,000 more votes than the highest contestant, to wit, than said Leona Jeffreys; that the defendant would guarantee that the plaintiff would get the first prize, and if necessary for that purpose would deliver enough votes to plaintiff to insure her the first prize, and that in the event that she did not secure the first prize the defendant would repay the plaintiff the sum of \$300?" One of the questions of fact contained the added interrogatory as to whether plaintiff had delivered the money to defendant because of her reliance upon the statements and assurances of defendant's employees that if she would pay the \$300 they would guarantee that she would get the first prize, and if necessary for that purpose would deliver enough votes to her to insure her the first prize, and that in the event she did not secure the first prize, defendant would repay her the sum of \$300. The ground upon which defendant based its motion for judgment on the facts as found on the special questions submitted was that these facts showed that the agreement between plaintiff and defendant's agents was a fraud upon other contestants, and that courts would not enforce the contract because of considerations of public policy. It nowhere appeared in the record that by any of the terms of the so-called

popular contest any condition of secrecy was imposed upon any of the contestants, or upon the publishers of the newspapers, as to the number of votes which any contestant might have to her credit at any time. In the published notice of the prize contest it was recited that count of the votes would be printed on Thursday and Sunday of each week of all votes turned into the office up to and including the preceding evening. The fraudulent representations complained of which induced plaintiff to part with her \$300 were made about a week before the contest closed. As to whether defendant's agents at any time had information regarding the condition of the vote as to any or all of the contestants, which they were bound not to disclose, can only be surmised, for it does not affirmatively appear in the record. If public announcement of the count was made as scheduled, then there would have been complete notice to all persons who might care to read it, every three days, of the vote tally as it then stood. In so far as the representation of the number of votes which the other contestants had at the time plaintiff was induced to pay over her money, is to be considered, that representation, if it had then expressed the truth, would not have worked any fraud as against the other contestants; but it nevertheless was one which plaintiff might well have relied upon to her damage. Neither would that portion of the alleged agreement, wherein defendant's agents promised that if plaintiff failed to secure the first prize they would refund to her her money, be in fraud of the rights of any of the other contestants, keeping in mind the suggestions which we have just made with reference to the question last discussed. To our minds, the further element which appears to have entered into that agreement, to wit, that in the event plaintiff had not enough votes to secure her the first prize, defendant, "if necessary for that purpose, would deliver enough votes to plaintiff to insure her the first prize," may be rejected from consideration. As determined by the special findings, the damage accrued to plaintiff by reason of the false representations made to her as to the condition of the vote at the time she paid to defendant the \$300. If the facts as to the count at that time were as represented, then the additional votes which plaintiff secured by the payment of her money would have won for her the first prize in the contest. Any of the contestants would have had the privilege, no doubt, of

paying in a like or greater sum of money and purchasing votes of an equal amount or more than those purchased by the plaintiff, and it appears to have been altogether within the rules of the contest that votes could be so secured by any of the contestants or their friends, the money so paid being credited on account of the subscription price of the newspapers. From all that appears in the record, it would seem that the plaintiff, a young girl, acted in entire good faith, without any intention of doing otherwise than to secure for herself votes in a manner which was alike available to any of the other contestants. The defendant admitted that it received all of her money, and admitting the falsity of the representations upon which it was secured, has sought to withhold the refunding of plaintiff's property through the claim that the contract as made contravenes the public policy of the law. It is but fair to say, however, that from the record there can be gathered enough to show that defendant was deceived and misled by its own agents who had charge of the subscription contest, and that, except for the acts of such agents, its conduct cannot be said to bear the imputation of fraudulent dealing. It was alleged on behalf of defendant that the agents who secured from plaintiff the \$300 were not acting within the limits of their authority when they made the representations to plaintiff as charged. That question was settled adversely to defendant by the verdict of the jury, and is not open to review on this appeal. We think that the special findings of the jury were not inconsistent with the general verdict returned, and that the court erred in granting the motion of defendant. Before relief may be denied because of the unlawful nature of a contract, whereby some rule of public policy is claimed to have been violated, it must appear clearly that the case comes within that class, and that the agreement of the parties in its essential obligations is tainted from improper motives. To our minds, the case as it is exhibited by this record is not one of that kind.

The judgment is reversed.

Allen, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 30, 1912.

[Civ. No. 899. Third Appellate District.—February 29, 1913.]

- L. **QUARTAROLI, CHARLES DAL POGGETTO, J. FOCHETTI and N. J. HEGGIE**, as Administrator of the Estate of **C. AGUILLON**, Deceased, Appellants, v. **CITY OF SONOMA** and **JAMES B. NEWMAN**, Respondents.

BUILDING CONTRACT WITH CITY—ABANDONMENT—MATERIALS LEFT ON GROUND—CITY'S OWNERSHIP—ABSENCE OF LIEN—INVALID TRANSFER BY CONTRACTOR.—Where a contractor, under a valid building contract with a city, after part performance thereof, abandoned the contract, leaving materials on the ground acquired for use in the building, the city, as owner of the building, becomes the owner of such materials, under section 1200 of the Code of Civil Procedure, and is entitled to use the same in completing the building according to the contract; and the fact that the building is not subject to any lien cannot affect the city's rights to such materials, nor can its rights be defeated by any attempt of the contractor to transfer the same absolutely, or by way of securing his creditors.

ID.—ABANDONMENT OF MATERIALS BY CONTRACTOR—USE IN BUILDING—ACTION FOR VALUE BY ASSIGNEES NOT TENABLE.—The contractor's abandonment of the contract was in legal effect as much the abandonment of the materials delivered and on the ground, as of the materials which had gone into the building, and all of the materials are to be treated alike as the property of the owner. After they have been used in the building in completion of the contract, the contractor certainly could not maintain any action for the value of the materials left on the ground, neither could his assignees be accorded any stronger position.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. Thos. Denny, Judge.

The facts are stated in the opinion of the court.

James C. Sims, and James W. Oates, for Appellants.

Robert A. Poppe, and A. B. Ware, for City of Sonoma, Respondent.

William F. Cowan, for James B. Newman, Respondent.

CHIPMAN, P. J.—Plaintiffs bring the action to recover the possession of certain personal property or the value thereof, in case delivery cannot be had, alleged to be \$3,590.85. They claim ownership by virtue of a bill of sale from one John T. MacQuiddy, of date September 13, 1906. MacQuiddy had entered into a written contract with defendant, the city of Sonoma, to construct a municipal building for that city, agreeing to furnish all materials and labor therefor at the agreed price of \$15,475. This contract was duly authorized and legally entered into and was duly recorded. No question arises as to full compliance with the provisions of the statute relating to the making and recording of such contracts. At the same time MacQuiddy executed a bond with said city, "in the sum of \$4,000"; on which plaintiffs, including defendant Heggie's intestate, were sureties, which recited the making of said contract and was conditional upon its faithful performance by MacQuiddy, and that he "shall make full payment to all persons supplying him labor or materials in the prosecution of the work provided for in said contract." This bond was also recorded at the same time and with the contract. MacQuiddy entered upon the work and prosecuted it up to September 8, 1906, on which day, as found by the court, "work ceased upon said building or the construction thereof and was wholly abandoned, and the said John T. MacQuiddy ceased to do any work upon said building from the eighth day of September, 1906, and said cessation from work and the finishing of said construction and the abandonment of said work and said contract by said MacQuiddy on said unfinished building continued for more than forty days after said cessation of work by said contractor MacQuiddy, and that at the time of the abandonment of said contract by said contractor MacQuiddy the articles of personal property and the materials mentioned in the answer of said city of Sonoma, which were materials necessary for the construction of said building, were then actually delivered and on the ground where said building was to be constructed, and that the same and all thereof were necessary materials for the construction of said building, and were actually delivered and on the ground where the same were to be used in the construction of said building, and that all of the aforesaid personal property was used and placed in the said building by defendant Newman at the instance of the

said city of Sonoma long prior to the commencement of this action."

It appeared, and was so found by the court, that after MacQuiddy ceased work the city called upon him to resume work, which he neglected and refused to do, and on September 13, 1906, he made the bill of sale to plaintiffs, on which they rely. The court found further as follows: "That said John T. MacQuiddy entirely failed to complete said contract or to perform the conditions and covenants and agreements therein set forth, and that by reason of said default and failure to carry out said contract, said defendant city of Sonoma was compelled to and did, after proceedings had to that end, let to the highest bidder, to wit, to defendant, James B. Newman, and entered into a written contract with him for the completion of said building in all respects as it was to be completed under the original contract to and with the said MacQuiddy, and the said James B. Newman and the said city of Sonoma entered into a contract for the completion of said building in and at the price of \$14,200 . . . ; and that prior to the entering into said contract with said Newman and subsequent to the failure and abandonment of the said MacQuiddy to perform his said contract, the said materials and articles of personal property, being then and there actually delivered and were upon the ground where said building was to be constructed, the said city of Sonoma caused to be estimated, inventoried and listed, the said articles of personal property as nearly as possible by the standard of the whole contract price entered into by the said MacQuiddy with said city, and that the said materials and all thereof were delivered to the said James B. Newman by the said city of Sonoma for the completion and construction of said building and the carrying out of the said contract with the said Newman, and that said James B. Newman was furnished the said materials set forth in the separate answer of the said city of Sonoma by the said city, and that the same were placed in and used by him in the construction and completion of said municipal building." The court also found: "That the said city of Sonoma has paid out and expended the sum of \$15,200 in cash for the carrying out the completion of the building entered into by the said MacQuiddy and abandoned by him, and for the carrying out and completion of the contract as entered into by the

said defendant James B. Newman for the completion of the building, which was completed in all respects in accordance with the original contract, and that all of the materials and articles of personal property in controversy herein and herein sued for was actually used and necessarily used in the completion of the said municipal building, and that its value is hereby fixed at the sum of \$3,590.85, and that if the city of Sonoma is or should be compelled to pay therefor the said sum of \$3,590.85 to the plaintiffs, then and in that case the said city of Sonoma would lose and be damaged in the sum of the value thereof, to wit, \$3,590.85, and that no part of the said sum has been paid to the said city of Sonoma, and that the bondsmen who executed the bond herein referred to and who are the plaintiffs in this action (with the exception of the said C. Aguillon, whose administrator is a plaintiff herein), would be liable to the said city for the said sum. That the said bond is a valid and legal bond, and indemnified, to the extent of \$4,000, the said city of Sonoma from all damages which the defendant city of Sonoma should sustain by reason of the failure or abandonment of the said MacQuiddy to perform his said contract. That there is in the treasury in the city of Sonoma the sum of \$275 properly applicable to the payment of the plaintiffs' claim for damages or from any cause arising out of the use of the said property by the said city and the said materials and articles of personal property which were used in the construction and completion of said building, and that there is no other money or funds applicable to the payment of the claim or demand of the plaintiffs herein sued upon, and that there will not be in the treasury of the said city any greater or other amount than the said sum of \$275 in the general fund of the said city properly applicable to the payment of the said claim. That the plaintiffs are bound by their bond for any loss occasioned to the city of Sonoma by reason of the said abandonment of the said contract and the said contract entered into by the said city with the said MacQuiddy to the extent of \$4,000, and that the building was only completed at and for the sum of \$15,200 after using all of the said materials and personal property involved in this action in the construction and completion of said building, and that the plaintiffs are estopped from re-

covering any other or further amount than the said sum of \$275."

It appears that defendant Newman's contract gave him the right to use the materials in question "free of cost to him and to be used in the construction of said building."

Upon the alleged sale to plaintiffs the court found as follows: "That on September 13, 1906, and while the said materials were upon the said plaza and grounds upon which the said municipal building was to be erected, and was thereafter erected, the said John T. MacQuiddy made a bill of sale to the said Quartaroli, Dal Poggetto, J. Fochetti and C. Aguilon, and that said bill of sale was given to them to secure them as the bondsmen of the said John T. MacQuiddy in the said sum of \$4,000, and to secure them on account of other obligations that they had entered into for and on behalf of the said John T. MacQuiddy. That at the time of making the bill of sale, the said parties to whom the same was made placed a man in charge of the materials and covered it with a canvass to protect it from the elements; that the defendant city of Sonoma made an inventory and estimate of the material before it was used in the construction of the said building and knew of the claim of the said parties to whom the said bill of sale was made; that defendant Newman completed the contract and the building was accepted by the city and he received \$14,200 from the city; that while John T. MacQuiddy was working upon the said building he received from the city for material and labor on said building the sum of \$1,000."

The evidence was that MacQuiddy, on September 13th, pointed out to plaintiffs the material in question, and they put a canvass over part of it and for a couple of days a man had charge of it. But it was not moved from the plaza nor taken possession of otherwise by plaintiffs. The court further found that "at no time prior to the commencement of this action or at any time did plaintiffs demand" of either of the defendants "the possession or return of said property"; that, prior to the commencement of this action, plaintiffs had knowledge of the letting of said contract to Newman, and that all of said materials had been used in the completion of said building as originally contracted for by said MacQuiddy, "and the said defendant Newman in submitting his bid and in entering into said contract for the completion of said building did

so upon the consideration and express understanding that the said materials described in the answer of said defendant city were to be used by him in the completion of said building and without cost or expense to the said Newman, all of which was well known by the plaintiffs herein and their predecessors in interest, and the said plaintiffs did not at any time notify said defendant Newman that they claimed the said property or were the owners of said property, or that the same had been assigned to them by said MacQuiddy until after the completion of said building, but, on the contrary, the said plaintiffs and their predecessors in interest, having full knowledge that the city of Sonoma claimed the said personal property as its own, and that the said Newman intended to use the same in the completion of the building, permitted the said Newman to expend large sums of money in using the said property in the said building without objection and without any claim or notice that the said plaintiffs were the owners of the said personal property by assignment from said MacQuiddy, or otherwise, and by reason thereof the said plaintiffs are estopped from recovering from the said Newman for the value of any of said property."

As conclusions of law the court found that plaintiffs are entitled to judgment "against the city of Sonoma only for the sum of \$275, and that they are not entitled to their costs, nor is the city of Sonoma entitled to its costs," and, as to the defendant Newman, that plaintiffs are entitled to recover nothing and that defendant Newman recover his costs.

Judgment passed accordingly, from which and from the order denying their motion for a new trial plaintiffs appeal.

The findings indicate the character of the answer, which is quite lengthy and need not be set out. It denied plaintiffs' ownership or right of possession; set up MacQuiddy's contract and bond and breach thereof; that the city was compelled to complete the building and make the contract to that end referred to in the findings; that plaintiffs were estopped by their conduct; that defendants were entitled to set off or counterclaim plaintiffs' demand by reason of their bond given to the city and generally pleaded the issues to which the findings respond.

Respondents urge the point that the bond given by the contractor on which the plaintiffs here were sureties is in itself

a complete answer to the claim of plaintiffs, as it exceeded in amount their claim; that this bond falls under the rule in *Union Sheet Metal Works v. Dodge*, 129 Cal. 393, [62 Pac. 41], and other cases, because it was a voluntary obligation and not entered into pursuant to section 1203, Code of Civil Procedure, and therefore was not void, as was held in cases such as *Shaughnessy v. American Sur. Co.*, 138 Cal. 533, [69 Pac. 250, 71 Pac. 701], and *Montague etc. v. Furness*, 145 Cal. 205, [78 Pac. 640], where it appeared affirmatively that the bond was given under the command of section 1203.

It is also strongly urged that plaintiffs are estopped to recover because they knew, at the time he attempted to convey the property to them, that MacQuiddy had abandoned his contract and quit work, leaving the material in question in plaintiffs' possession where it had been delivered to be used in the construction of the building; that they knew the city had advertised for new bidders and that this property was to be considered in the bids as subject to be used by the successful bidder, and with this knowledge and the further knowledge that it was so used, they made no demand for its delivery to them and made no objection to its use in the building or forbade its use.

Respondents also claim that the entire building fund, with the exception of \$275, was exhausted in the payments made to defendant Newman, under his contract, and that there are no longer any funds in the treasury out of which plaintiffs' claim could be paid.

Respondents also claim that the evidence showed that the transfer by MacQuiddy of his interest in the property was by way of security and was not consummated by delivery and was ineffectual as a sale.

In some of these contentions there is much force, but we do not find it necessary to enter upon their discussion or decide the questions thus presented. It seems to us that section 1200, Code of Civil Procedure, conclusively establishes the right of the city, on the abandonment of the contract by MacQuiddy, to treat as its own the materials formerly belonging to him which were then on the ground in the city's possession, delivered there for the purpose of being used and which were used in the construction of the building, and that he had no right to defeat such ownership of the city or its right to use the ma-

materials for the purposes for which they were intended, by the attempted transfer to his creditors either absolutely or as security. The section is as follows:

"In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections one thousand one hundred and eighty-three and one thousand one hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens."

The section has received construction many times where the contractor had abandoned his contract and the rights of materialmen were involved. (*McDonald v. Hayes*, 132 Cal. 490, 495, [64 Pac. 850]; *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 114, [79 Pac. 152]; *McClure v. Jackman*, 7 Cal. App. 703, [95 Pac. 673]; *Duffy Lumber Co. v. Stanton*, 9 Cal. App. 38, [98 Pac. 38].) We find no case in our reports where the precise question here involved has arisen. It is this: When a contractor abandons his contract and quits work on the building, leaving materials on the premises in possession of the owner of the building which the contractor has purchased and placed there to be used in the construction of the building, can he sell these materials or transfer them to creditors as security for his indebtedness to them, thus defeating the owner of all right thereto?

It is urged by appellants that, inasmuch as under the decisions (*Mayrhofer v. Board of Education*, 89 Cal. 110, [23 Am. St. Rep. 451, 26 Pac. 646], and others) the building could not be made the subject of a lien, the section has no just application here. Also, by its terms it concerns only the persons who may claim liens and does not concern the owner except as to such liens. It is true it protects persons entitled to liens in certain cases, but it specifically provides that, upon the abandonment of the work by the contractor, the "materials

then actually delivered or on the ground, *which shall belong to the owner,*" shall be deducted, etc.

An examination of the statute shows that the work and materials already done and furnished, including the materials then actually delivered and on the ground, shall, upon the abandonment of the work, belong to the owner, subject to such rights as are given to laborers and materialmen. The materials on hand are declared to belong to the owner, who may use them in the completion of the building, at their value, ascertained by the rule prescribed in the statute. The materials here were purchased by the contractor and were delivered on the ground to be placed in the building pursuant to his contract, and remained in the owner's possession after the contractor abandoned his contract and prior to any attempted transfer thereof. His abandonment was as much the abandonment of the materials delivered and on the ground as of the materials which had gone into the building. By the same token all the materials referred to in the statute are treated alike.

It is true that, where there are liens of materialmen capable of enforcement, the statute gives them certain rights, after the owner is fully protected, but whether there are enforceable liens or not, the fact does not take from the owner the rights given him. He finds himself with an uncompleted contract and with certain materials left on his hands by the defaulting contractor. His right to complete the building at the cost of the contractor is undoubted, and he certainly should have the right to lessen the cost to himself by using the materials which the statute says belong to him. Otherwise, the statute has little meaning for him.

In the case of *White v. Miller*, 18 Pa. 52, the controversy arose between an execution creditor who had sold on an execution against the contractor certain lumber after it was delivered on the ground on which the house was being erected and before it was worked into the house. In sustaining the lien as against the owner the court took the view that the delivery of the lumber was on the credit of the building and not of the contractor; that the title to it was vested, by the delivery, not in him, but in the proprietor of the building, "subject only to the revendication of the seller." "The ownership of it," said Gibson, C. J., who delivered the opinion, "between the time

of delivery and of working it into the building, could not be in the contractor, because it was delivered to him, not on his own credit, but on the credit of the building to which it was destined. It was sold for the building and, consequently, to the owner of it." What the statute was in Pennsylvania at that time does not appear. It is to be inferred from the opinion that the principle on which the decision rests was invoked for the protection of materialmen and as "not only a just but a convenient one." Here, however, we have a statute making the owner of the building the owner of the materials delivered and on the ground at the time the contractor has abandoned his contract. There are no lien claimants; the question is one solely between the owner and the contractor. Every consideration of justice and fair dealing would seem to support the view we have taken of the statute. Appellants' contention apparently is that the bond is void and, in effect, that the owner is powerless to protect himself by a bond; that the contractor had the right to abandon his contract and turn over the materials delivered and on hand to whom he pleased, casting upon the owner the burden of completing the building at his own cost, which the contractor, confessedly, is unable to do and who may be insolvent. If the controversy were between the contractor and the owner for the value of this property, used, as it was, in the completion of the building and in the carrying out of the contractor's obligations, no court would entertain the contractor's claim, and we cannot see that his assignees should be accorded any stronger position.

The case of *Steiger v. City of Sonoma*, 9 Cal. App. 698, [100 Pac. 714], relied on by appellants, is not in point. There no delivery of the property had been made to the contractor and title had not passed to him, and for that reason it was held not to come within the provisions of section 1200, Code of Civil Procedure, but there, as in other cases, it was held that this section furnishes the rule for the disposition of materials belonging to the contractor, when he abandons his contract, which have been delivered and are on the ground where the building is to be erected.

It is only upon the theory that the contractor has abandoned all right to the materials and that the ownership thereafter is in the owner of the building, that any claim of lien is given

the mechanic and materialman. There is no reason why this relation of the owner to the property should change because there are no lienors or because the building happens not to be subject to a lien.

It will be observed that the owner of the building is given the right to deduct all payments "then due and actually paid, according to the terms of the contract," from the value of the work and materials that have gone into the building, "including materials then actually delivered or on the ground," and the remainder "shall be deemed the portion of the contract price applicable to such liens." In other words, the owner of the building is chargeable with the abandoned materials in an adjustment of the liens. Why, then, should the contractor have the right to do as he pleases with these materials when the statute deals with them as belonging to the owner of the building?

In the case of *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, [97 Pac. 152], it was held that where a valid contract in writing for the erection of a building has been executed and filed, and the work thereunder has been abandoned by the contractor before completion, the amount of the contract price applicable to liens of persons other than the contractor is to be determined by section 1200, Code of Civil Procedure. Also, that if the payments made by the owner pursuant to the contract amounted, at the time of the abandonment, to more than the value of the work and materials then done and furnished, estimated by the standard of the whole contract price, no part of the contract price is applicable to the payment of liens, and lien claimants must look to their personal claim against the contractor, and this extends as well to the final reserved payment of the contract price. It was also held that in determining the value of work done and the materials furnished up to the time of abandonment, under section 1200, it is proper to consider not only the value of the work done and materials furnished at the time of the abandonment, but also of the work left undone and the materials yet to be furnished, i. e., the necessary cost of the completion of the contract. We can see no way by which this view of the statute can be realized except upon the assumption that not only the work and materials that have gone into the building, but also the mate-

rials delivered and on hand for that purpose, shall belong to the owner of the building.

Whether the court was justified in awarding plaintiffs the \$275 to the credit of this fund after the completion of the building is a matter of which appellants cannot complain.

It may be that some of the findings of the court on other defenses than the one we have considered are not supported. Still, if we are correct in our view of section 1200, the finding on the defense is sufficient to support the judgment, disregarding all others.

We discover no prejudicial error in the record, and hence the judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 29, 1912.

[Civ. No. 909. Third Appellate District.—February 29, 1912.]

HARRIET LININGER, Appellant, v. SAN FRANCISCO, VALLEJO AND NAPA VALLEY RAILROAD COMPANY, a Corporation, Respondent.

ELECTRIC CARS—WARNING AT CROSSING—CODE SECTION REGULATING STEAM RAILROADS INAPPLICABLE.—Section 486 of the Civil Code, which was enacted in 1872, applies to a steam locomotive engine on a railroad, and requires a twenty pound bell or a steam whistle to be attached thereto and rung or sounded at a distance of eighty rods from a railroad crossing and continuously until it is passed, and is inapplicable to a train of electric cars, which had no existence when that section was passed, in respect of which the steel gong or compressed-air whistle are the best and most effective devices to give warning of its approach to a crossing.

Id.—COLLISION OF AUTOMOBILE WITH ELECTRIC TRAIN—STRIKING OUT PARTS OF COMPLAINT.—In an action for injuries sustained as the result of a collision of an automobile with an electric train, the court properly struck from the complaint inapplicable matter based on section 486 of the Civil Code, and also evidentiary matter relating to a city ordinance, regulating the movement of trains through the city, which it was not necessary to plead.

ID.—CONSTRUCTION OF CITY ORDINANCE REGULATING SPEED AT DISTANCE FROM DRAWBRIDGE.—A municipal ordinance of the city of Napa, which provides that “no person shall run or propel any railroad car, locomotive hand-car, or any train of cars, or any trolley car in the city of Napa at a greater speed than four miles per hour, within one thousand feet of any drawbridge,” is held to mean, under a reasonable construction, “within one thousand feet, when approaching any drawbridge.” If the city council intended to limit the speed for two thousand feet in all, on both sides of the drawbridge, without any reason therefor, the ordinance would be void.

ID.—PLAINTIFF AS GUEST OF OWNER OF COLLIDING AUTOMOBILE NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE.—Where it appears that plaintiff was merely a guest of the owner of the automobile who was driving it when it collided with the electric train at a crossing, having no control over the running of the same, and that the defendant is chargeable with negligence in the mode of running its train, the plaintiff cannot be chargeable with contributory negligence, even if the owner of the automobile was also negligent in attempting to cross rapidly in front of the approaching train, and his negligence contributed to the accident.

ID.—IMPROPER NONSUIT—EVIDENCE OF DEFENDANT'S NEGLIGENCE.—Upon a motion for nonsuit, all of the evidence for the plaintiff, and all inferences therefrom, must be taken as true; and where plaintiff's evidence tends to show that an ordinance of the city limits the speed of the electric train within the corporate limits to the rate of eight miles per hour, and that its speed was greater than that in passing the crossing, and that the plaintiff violated its common-law duty to give reasonable or any warning of its approach to the crossing, it is held that there is sufficient evidence for the plaintiff to establish defendant's negligence in both respects, and there being no evidence tending to show any contributory negligence of the plaintiff, the nonsuit granted upon plaintiff's evidence cannot be sustained.

ID.—ACTION OF DRIVER OF AUTOMOBILE IN VIEW OF SUDDEN PERIL.—Although the plaintiff was not responsible as a mere guest of the owner of the automobile, for his action in driving the same when the collision occurred, yet in considering his evidence for the plaintiff, and in judging his conduct at that time, the situation must be viewed as it then appeared to him—that he heard no bell or warning, that he was approaching the crossing at eight or ten miles an hour, and that, when he suddenly saw the car approaching, he feared that his new tires would not hold, and would slide onto the track in front of the train, and therefore judged it best to rush across—he, being thus suddenly put into peril, without sufficient time to consider all the circumstances, is excusable for omitting some precautions, or making an immediate choice under this disturbing influence.

ID.—CONCURRING CAUSE OF ACCIDENT—NEGLIGENCE OF DEFENDANT AS PROXIMATE CONTRIBUTORY CAUSE—QUESTIONS FOR JURY.—Where it is a reasonable inference from plaintiff's evidence that the negligence constituted a proximate contributory cause of the injury to the plaintiff, and that if the negligence of the driver of the automobile, for which plaintiff is not responsible, be regarded as precipitating the disaster, this latter should not be regarded as the sole independent cause, but conjointly with the continuous negligence of the defendant as the concurring cause of the injury, the question of defendant's liability to the plaintiff for negligence should have been submitted to the jury.

APPEAL from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Clarence N. Riggins, for Appellant.

John T. York, for Respondent.

BURNETT, J.—The action was for damages for personal injuries as the result of a collision between one of defendant's electric cars and an automobile in which plaintiff was riding as a guest.

Certain portions of the complaint were stricken out, on motion of defendant, and a nonsuit was granted at the close of plaintiff's evidence. The complaint was constructed upon the theory that section 486 of the Civil Code applies to electric cars, and the ruling of the court upon the motion to strike out involved that consideration. The section was enacted in 1872 and provides that "A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of \$100 for every neglect. . . . The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train or cars, when the provisions of this section are not complied with." Electric cars were not in existence and it does

not appear that they were contemplated at the time this law was passed. It could, therefore, hardly be said that they could have been in the mind of the legislature, but rather that the legislative intent was to require such a bell to be used upon the "locomotive engine" that, forty years ago, was familiar in transportation history. It may be said, also, that the alternative provision in reference to the "steam whistle" is significant in this connection as indicative of the legislative intent to confine the application of the law to "steam locomotives." Of course, the absence of actual intention to make the provision applicable to electric cars may not be conclusive of the question, but it is, manifestly, an important consideration. The subject received careful attention in *San Francisco etc. R. Co. v. Scott*, 142 Cal. 222, [75 Pac. 575], wherein the question concerned the application to street railroads of a provision in the constitution in reference to "railroads," etc. Through Mr. Justice Shaw, the court said: "There was therefore clearly an absence of actual intention in using the phrase 'railroads operated in more than one county' to make a provision which also should apply to street railroads, if, peradventure, in the future one should come within the description. If the word 'railroads' is to be extended so as to include street railroads, it is not because of the actual intention of those who framed and adopted the constitution to give the word that meaning, but because of the rule of law that where a provision is made by law for a certain class of subjects, and thereafter a new but similar subject is created, coming within the general description, and within the particular purpose and object of the law, it is to be considered as having been intended to be included within the original description. Thus, for illustration, a statute which imposes a penalty for 'feloniously driving any sort of carriage' was held to include and apply to bicycles, although at the time the statute was adopted bicycles had not yet come into existence. (*Taylor v. Goodwin*, L. R. 4 Q. B. D. 228.)" To determine whether the subject falls within the general description, resort must be had, as stated in the Scott case, *supra*, to the "words used, the context, the object in view, and the evils that were intended to be remedied." It is contended by appellant that the words used, "locomotive engine," are comprehensive enough to include the vehicle involved herein, consisting of a locomotive and passenger-car

combined in one. It may be conceded that the description of the car given by one of the witnesses brings it within the scope of the definition of the words, "locomotive engine," quoted from Webster's New International Dictionary of 1910, but when we consider the object to be accomplished by the statute and the evil intended to be remedied, we are satisfied that it would be unreasonable to give it the interpretation contended for by appellant. It is, no doubt, true that the purpose of the code section is the protection of the public. The legislature intended that the danger of accidents at railroad crossings should be obviated as far as practicable. To subserve a public need in this respect, the provision in question was enacted. But in consequence of the comparatively recent important development in the industrial application of electricity, we have this new and better motive power requiring a peculiar mechanical contrivance for the purpose of transportation, and it is found that the steel gong and the compressed-air "whistle" are the simplest and most effective devices for giving warning at the approach to a crossing. To require a twenty pound bell to be installed in an electric car would impose an unnecessary burden upon the owner and—what is more important—would not inure to the safety or benefit of the public. There is no reason why, therefore, the provision in question should be extended, beyond the obvious intention of the legislature, to include the situation that confronts us here. Some cases are cited to the point by both parties, but we deem it unnecessary to review them in detail. They involve somewhat different circumstances.

In *Fallon v. West End St. Ry. Co.*, 171 Mass. 249, [50 N. E. 536], however, the supreme court of Massachusetts says: "But we think that by the words 'locomotive engine or train upon a railroad' must be understood a railroad and locomotive engines and trains operated and run, or originally intended to be operated and run, in some manner and to some extent by steam. This, undoubtedly, was the sense in which the words were used by the legislature when the statute was enacted; and we do not feel justified now in giving to them the broad construction for which the plaintiff contends."

We think there was no error in striking from the complaint the ordinance regulating the movement of trains through the city. It constituted evidentiary matter and it was not neces-

sary to plead it. (*Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, [16 Ann. Cas. 1061, 98 Pac. 1063].)

A portion of ordinance 460 of said city provides that "No person shall run or propel any railroad car, locomotive, hand-car, or any train or cars, or any trolley car, in the city of Napa, at a greater rate of speed than four miles per hour within one thousand feet of any drawbridge." The trial court construed this to mean "within one thousand feet when approaching any drawbridge." We think this is the rational view of the provision. In its enactment the legislative body had in mind the crossing of a drawbridge by a train of cars and the peril that is incident thereto. In the construction of the ordinance, to ascertain the legislative intent, regard must be had not simply to the exact phraseology but to the general tenor and scope of the legislative scheme embodied in the statute. (*Oakland v. Oakland Water Front Co.*, 118 Cal. 189, [50 Pac. 277].) "If the act is susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consistent with justice, sound sense and wise policy, the former shall be rejected and the latter adopted." (*In re Mitchell*, 120 Cal. 386, [52 Pac. 800].) As stated by respondent: "Section 460 requires a more restricted rate of speed when the car or train is within one thousand feet of any drawbridge, than when it is passing through any other portions of the city, and while the drawbridge and the distance of one thousand feet on either side of it may be in the most sparsely settled portion of the city, and might be located wholly without the congested traffic centers and indeed while the track might be wholly located on private rights of way and be not crossed by any highway or other grade crossings, yet if the construction sought to be given it were to prevail, the city council intended to limit the speed for two thousand feet, without any reason whatever therefor. Such an ordinance would be void. (*Berry v. Chicago etc. R. R. Co.*, 90 Iowa, 106, [43 Am. St. Rep. 419, 57 N. W. 680]; *Evison v. Chicago etc. R. R. Co.*, 45 Minn. 370, [11 L. R. A. 434, 48 N. W. 6]; *Meyers v. Chicago etc. R. R. Co.*, 57 Iowa, 555, [42 Am. St. Rep. 50, 10 N. W. 896].)"

It is matter of common knowledge that, more or less frequently, frightful accidents occur at these crossings in consequence of the draw being open, and it was to minimize this

peril that the ordinance was passed. The trial court's construction of the provision is the only reasonable one, as we view it, and it is consistent with the best interests of the public.

Another more serious question remains to be considered. As to the law of negligence involved in the case, there seems to be no serious controversy between the parties. It cannot be maintained from the evidence that the plaintiff herself is chargeable with contributory negligence. As already stated, she was the guest of other parties and she had no control over the driver of the automobile. She was not aware of the approach of the car until it was too late for her to escape. But if there were a conflict in the evidence as to this, we would, of course, on the appeal from the judgment of nonsuit, be required to give full credit to every circumstance in her favor. Among other things, she testified that she sat on "the left back seat," that she knew nothing "about the running or management of automobiles," that she had never been in Napa before, that she knew nothing about the streets or location of the car lines, that she did not remember of either seeing or hearing defendant's car, that during the entire ride she said nothing to the driver in reference to the manner of driving the automobile, and she could not recall the immediate circumstances surrounding the accident.

The only other theory upon which the order granting the motion for a nonsuit can be justified is that all of the evidence shows that the accident was due solely to the negligence of Mr. Wisecarver, the owner and chauffeur of the automobile. It is not sufficient, manifestly, that the evidence may disclose that his negligence contributed to the accident, as his want of care cannot be imputed to plaintiff. In this respect the law admittedly is, as stated by the supreme court of the United States, in *Little v. Hackett*, 116 U. S. 366, [29 L. ed. 652, 6 Sup. Ct. Rep. 391]. There the party injured hired a public hack, but there is no difference in principle between that case and this. Through Mr. Justice Field the court said: "A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering against a railroad company for injuries suffered from a

collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver." It must be true, as stated therein, that "responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it."

But it is not denied that this is the law. This feature of the case may therefore be dismissed from further consideration. The vital inquiry remaining is, Does the record contain any evidence from which a rational inference may be drawn that the negligence of respondent contributed to the accident? We think this must unquestionably be answered in the affirmative. The law as to a nonsuit has been so frequently declared as to hardly need repetition. It is fully considered by this court in *In re Daly's Estate*, 15 Cal. App. 329, [114 Pac. 787]. Nowhere, probably, has the rule been stated more strongly than in the *Estate of Arnold*, 147 Cal. 583, [82 Pac. 252]. The gist of it is that all the evidence in favor of the one resisting the motion must be taken as true, and if contradictory evidence has been given it must be disregarded. In the application of this rule to the evidence we must bear in mind that there are two features involved in the consideration of the question of respondent's negligence. These relate to the speed with which the car was traveling and the presence or absence of any warning given as the car approached the crossing.

An ordinance of the city limits the speed within the corporate limits to the rate of eight miles an hour. "Where a train is run at a crossing at a rate of speed in excess of that limited by statute or ordinance, it is in most jurisdictions negligence *per se*." (33 Cyc. 976.) That is the law in this state. (*James v. Oakland Traction Co.*, 10 Cal. App. 785, 799, [103 Pac. 1082].) But, regardless of the ordinance, it was clearly the duty of defendant to use ordinary care in the operation of its cars for the purpose of avoiding injury to others and not to run them at a rate of speed which an ordinarily careful man would deem dangerous to others. (33 Cyc. 971.) The accident occurred in a business section of the city and at a point

where vehicles were frequently crossing the railroad and danger of collision was naturally to be apprehended. If there is any evidence, therefore, that the car was approaching the crossing at a rate of speed in excess of eight miles per hour, it would be a justifiable inference that defendant was negligent.

As to the second point, it is not disputed that the law is as stated in 33 Cyc. 956, as follows: "It is the common-law duty of those in charge of a train of cars, for nonperformance of which the railroad company is responsible, when approaching a public crossing, to give notice of the approach by all reasonable warnings, such as by blowing a whistle, ringing a bell, signal lights, or by such other devices as may be sufficient to give timely warning to travelers of their approach, so as to afford time for all approaching to stop in a place of safety. . . . This duty to give timely warning exists, notwithstanding there is no statute or ordinance requiring it." There is evidence in the record, which cannot be ignored, of negligence on the part of the railroad company in each of these respects. Without segregating it as to these two features, we proceed to exhibit a portion of said evidence. It was shown by the testimony of the general superintendent that the company required its cars to be run according to a certain schedule or timetable calling for a speed of more than nine miles an hour if they traveled continuously. With a proper allowance for stops it is a fair inference that this schedule would demand a speed of eleven miles or more. Robert Woods, who was near the scene of the accident, testified that the car came down the street at the rate of "about eleven or twelve miles an hour and the automobile was going about eight or ten miles an hour"; that he did not hear any alarm bell at any time from the time the car started at Main street until after the accident, except he thought he heard the bell just at the moment of collision, believing that it was caused by "a mud fender or wheel or something" striking the bell. Mabel Smith also testified that "the car was coming pretty fast" and she did not hear any alarm. Charles Steere was asked the question: "Did you hear any noise at all?" and he answered: "Nothing only the rumble of the car. I think if the bell had rung from where I was standing I could have heard it. I don't think there was any bell rung at all, because if there was I would have heard it, because I was within five, I guess, or ten feet of the corner."

Other witnesses testified to the same effect, but we will not quote any further except to give a part of the testimony of C. L. Wisecarver, the driver of the automobile. He said he approached the railroad at the rate of eight or ten miles an hour; that the defendant's car when he first saw it was six or seven feet from the corner; that he did not hear any bell; that he was about twenty-five or thirty feet from the railroad track when he first saw the car; that when he saw the car he didn't think he could stop—he had new tires and was afraid that they wouldn't hold; that he "would slide across onto the track in front of the car," and therefore he put on speed and tried "to get across the track in front of the car." In judging of his conduct we must, of course, view the situation as it appeared to him. Being suddenly put into peril "without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an immediate choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise." (*Schneider v. Market St. Ry. Co.*, 134 Cal. 482, [66 Pac. 734].) But, as already seen, his negligence is not attributable to plaintiff and, as far as this appeal is concerned, we may admit that he was negligent and the result will not be affected in the least.

Indulging, therefore, as we must, every favorable inference fairly deducible from the strongest showing made by plaintiff, we must hold as established facts that at the time of the accident defendant was operating its car at an excessive rate of speed and without giving the warning, as it approached the crossing, that the law exacts. From these premises it is at least a rational conclusion that the negligence of defendant constituted a proximate contributory cause of the injury to plaintiff. In other words, giving full credit to the showing made by plaintiff, it is not an unreasonable inference that the injury to appellant was a natural and probable consequence of the wrongful act of the railroad company, and that if the negligence of the driver of the automobile may be regarded as precipitating the disaster, this latter should not be regarded as the sole, independent, but conjointly with the continuous negligence of respondent, as the concurring cause of the accident. (*Pastene v. Adams*, 49 Cal. 87; *Tompkins v. Clay St. Ry. Co.*, 66 Cal. 163, [4 Pac. 1165]; *Merrill v. Los Angeles*

Gas & Elec. Co., 158 Cal. 499, [139 Am. St. Rep. 134, 111 Pac. 534].) As we view it, therefore, the question of defendant's liability should have been submitted to the jury.

It is needless to add that if upon the same evidence the case had been submitted and decided by the jury in favor of defendant or if a verdict in favor of plaintiff had been set aside by the court, we could not say that the decision was unsupported, but, in view of the well-established rule in reference to a motion for a nonsuit, we can see no escape from the conclusion that the case was improperly withdrawn from the jury. The judgment is therefore reversed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 926. First Appellate District.—March 1, 1912.]

F. KNOBLOCH, Respondent, v. F. BADER, W. WORSWICK and J. WORSWICK, Copartners, etc., et al., Appellants.

ACTION UPON NOTES—CONSIDERATION—DEED OF GRAVEL LAND—ASSIGNMENT OF OTHER ASSIGNED RIGHTS—ABSENCE OF FRAUD.—In an action upon two notes, the consideration of which was, *in solido*, a deed of gravel land from the payee and an assignment of such other rights as the payee had taken only by assignment from other contracting parties, it is held that there was no deceit or fraudulent representation as to the duration of one of such assigned rights, and where it appears that the maker was permitted to work gravel thereon for one year, it cannot be maintained that there was any failure of consideration for the notes, in whole or in part.

APPEAL from an order of the Superior Court of Fresno County denying a new trial. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Everts & Ewing, for Appellants.

E. S. Van Meter, and N. C. Coldwell, for Respondent.

KERRIGAN, J.—This is an appeal from an order denying defendants' motion for a new trial in an action on two certain promissory notes.

The case was thus: On the nineteenth day of April, 1904, the plaintiff made and executed a deed of certain described real estate containing gravel; also an assignment of all right which the plaintiff had to take gravel from certain lands of the Pacific Improvement Company at a place called Pollasky, by virtue of a contract between one T. W. Pratt and said company; and also all the right that the plaintiff had under a certain verbal contract with one J. M. Braly to take gravel from described lands opposite Pollasky. In partial consideration of the deed and assignment, the defendants executed and delivered to the plaintiff two promissory notes—the subject of this action.

Defendants set forth in their pleadings, and now claim, that plaintiff represented to them that he had an assignment from Pratt of a right granted him by the Pacific Improvement Company to remove gravel from their lands for a period of two years in such quantities as he might desire; that this representation was fraudulently made, Pratt's right to remove gravel not being in fact for any definite period; that it was upon the strength of this false and fraudulent representation, and upon no other consideration whatever, that defendants accepted the said deed and assignment and made the said promissory notes.

The court found against the defendants' position, which finding, upon an examination of the record, we conclude is amply supported by the evidence.

In the course of the negotiations there evidently was something said to the effect that plaintiff's interest in the lands of the Pacific Improvement Company was for the period of two years; but plaintiff did not, as is asserted by defendants, pretend or represent that he had a definite arrangement for that length of time. On the contrary, according to the testimony introduced by the plaintiff, he told the defendants that he was selling them only such interest as Pratt had transferred to him in said gravel land at Pollasky. The attorney who drew up the papers in the transaction for the parties testified that the plaintiff, in the presence of defendant Bader, referring to his interest in the land, said: "I do not know just exactly what

it is, . . . whether a contract or a lease; I do not know just what it is, but it is some kind of an agreement that Pratt has with the Pacific Improvement Company to take gravel from the land for two years." At this time Pratt was on his death-bed and unable to be seen, and apparently the parties were unable to learn just what the nature and extent of Pratt's interest in this land was; but the plaintiff nevertheless gave the defendants all the light he could on the subject, and they knew as much about it as he did himself. Hence it is plain that he practiced no deceit upon them.

On the point of failure of consideration, in addition to the three property rights transferred as above mentioned, there were two others, and they all passed as one consideration *in solido*; and the defendants, according to the evidence introduced by plaintiff, having received just what they bargained for, and having removed gravel from the property of the Pacific Improvement Company for about a year under the Pratt lease or license, we cannot conceive how it can be successfully contended that the transaction was without consideration.

Having come to this view on the evidence in the case, it is unnecessary to discuss the questions as to whether or not defendants' pleadings and evidence allege and prove facts showing a rescission by them.

The order appealed from is affirmed.

Hall, J., and Lennon, P. J., concurred.

[Civ. No. 922. First Appellate District.—March 1, 1912.]

J. A. HENRY STOECKLE, Respondent, v. WILLIAM KARR and GEORGE A. HERRICK et al., Defendants; WM. KARR, Appellant.

ACTION FOR MONEY HAD AND RECEIVED—CONTRACT TO PURCHASE CIGAR STORE—ASSIGNMENT NOT EFFECTED—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE.—In an action for money had and received, which had been paid under a contract to purchase a cigar store, upon the theory that no sale had been effected, where plaintiff's evidence was that the money was paid with the guaranty that if the cigar

stock did not amount to \$700, no sale was to be effected, that no assignment was in fact made, that an inventory of the stock was agreed upon and was refused upon demand, and that the contract was rescinded, but the evidence of defendant was conflicting as to the terms of the contract, and that no inventory was agreed upon or needed, it is held that the findings for plaintiff, upon the conflicting evidence, cannot be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Frank Schilling, and Lee M. Olds, for Appellant.

J. C. Flannery, for Respondent.

KERRIGAN, J.—This is an appeal by defendant, William Karr, from a judgment against him in favor of the plaintiff.

On the ninth day of August, 1910, the appellant and the plaintiff entered into a contract whereby appellant was to sell to the plaintiff a certain cigar store on Devisadero street in San Francisco. On that day plaintiff paid on account of the purchase price the sum of \$30, and two days later he paid the balance of \$820. Subsequently a dispute arose between the parties, and the property never changed hands. Plaintiff demanded the return of his money, and his demand being refused he brought this action for money had and received, upon the theory that no sale of the cigar store had been effected, and recovered judgment as above stated.

The sole ground urged for a reversal of the judgment is that the evidence is insufficient to support the findings. Our study of the record leads us to the conclusion that this view is untenable.

The evidence introduced by defendant tends to show that the plaintiff was offered the cigar-stand on either of two propositions. By one he was to pay for it the sum of \$850 as it stood without condition or limitation of any kind. By the other proposition an invoice of the stock of goods was to be made, and the plaintiff was to pay therefor at wholesale rates, together with the sum of \$150 for the goodwill of the business. Defendant's evidence tended to show that the

plaintiff accepted the former proposition, and accordingly paid the agreed price of \$850. Plaintiff, on the other hand, introduced evidence tending to prove that he paid the \$850 with the understanding that \$150 was for the goodwill of the business, and with guaranty and arrangement that the stock of goods would amount in value to \$700; that unless it did so no sale was to be considered effected. It is true that the evidence is not at all direct and clear on this point, but that is largely due, we think, to the fact that the plaintiff is of foreign birth and not very familiar with the English language. The circumstances of the case tend, however, strongly to support this view. No arrangement was made for the assignment of the lease of the store to plaintiff until after the \$850 was paid, and no assignment of it was in fact made to the plaintiff. It was agreed, according to the evidence on behalf of plaintiff, that an inventory of the stock was to be made, and it is not contradicted that the plaintiff with his son repeatedly called by appointment with the appellant at the store for the purpose of taking the same. Each time, however, the plaintiff was put off on what must have seemed to the trial court a disingenuous excuse and one indicating bad faith on the part of the appellant. On the last of these visits appellant asked plaintiff to take possession of the store and to make the necessary inventory afterward, and upon plaintiff's refusal to do so declared that no inventory of the stock was necessary, and moreover that plaintiff's receipt would not disclose that he was entitled to one. All this time appellant apparently remained in charge of the business, taking and keeping for his own use the receipts thereof. According to the contract the agent of the appellant, through whom the sale was negotiated, was to file with the recorder a five days' notice of the sale, which he failed to do until the day that plaintiff gave notice of rescission, and it was not until this day either that the agent paid over the amount of the second payment to appellant.

To say the least, it is certain that there is evidence in the case amply sufficient to support the findings, and under the familiar rule that when there is a substantial conflict appellate courts will not disturb the findings of the trial court, the judgment must be sustained.

The judgment is affirmed.

Hall, J., and Lennon, P. J., concurred.

[Civ. No. 1045. Second Appellate District.—March 1, 1912.]

THOMAS V. CASSIDY, Petitioner-Respondent, v. T. B. CANNON, Justice of the Peace of Gardena Township, County of Los Angeles, etc., Respondent-Appellant.

WRIT OF PROHIBITION—CHARGE BEFORE ONE JUSTICE OF THE PEACE OF MISDEMEANOR OF ANOTHER—REFUSAL TO ALLOW INSPECTION OF DOCKET.—The writ of prohibition will not lie to restrain one justice of the peace from trying another justice of the peace for misdemeanor in refusing to permit an inspection and examination of his docket during office hours, since justices of the peace have jurisdiction of misdemeanors, and the affidavit filed before such other justice was an attempt to set up facts constituting a misdemeanor, the sufficiency of which to show a misdemeanor he had jurisdiction to pass upon and determine, rightfully or wrongfully, and the superior court erred in granting the writ.

ID.—OFFICE OF WRIT OF PROHIBITION.—The writ of prohibition is not a writ of error to determine the correctness of the decision of an inferior tribunal, but it only lies where a public officer is proceeding without or in excess of jurisdiction, and no plain, speedy and adequate remedy at law exists.

ID.—PUBLIC OFFENSE NOT STATED—REMEDY BY HABEAS CORPUS.—If, as claimed by the petitioner for the writ of prohibition, no facts are averred constituting a public offense, he has ample relief, in case he is found guilty, through a writ of *habeas corpus*.

ID.—REFUSAL OF OFFICER TO PERFORM A PUBLIC DUTY—REMEDIES.—The refusal of an officer to perform a public duty amounts to an omission in that regard, and is a misdemeanor under section 176 of the Penal Code, or he may be proceeded against under section 772 of the Penal Code. (Opinion denying rehearing by appellate court.)

ID.—OPINION ON PETITION FOR REHEARING IN SUPREME COURT—LIMITATION OF DENIAL.—The supreme court, on denial of a rehearing, bases its order on the last above decision, which shows sufficient ground for reversal of the judgment, and no opinion is expressed as to the other doctrines stated in the original opinion.

APPEAL from a judgment of the Superior Court of Los Angeles County granting a writ of prohibition to a justice's court. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

Randall & Gaines, for Respondent-Appellant.

Hester, Merrill & Craig, for Petitioner-Respondent.

ALLEN, P. J.—Petitioner presented his affidavit to the superior court of Los Angeles county in which it was alleged that he was a qualified and acting justice of the peace; that respondent Cannon was also a justice of the peace in said county; that one Kent filed an affidavit before said Cannon, charging that petitioner “did willfully, unlawfully and maliciously, on June 1, 1911, omit and refuse to perform his duty enjoined upon him by law, and refused to permit Jesse W. Kent, during office hours, the right to inspect and examine a public record, to wit, the justice’s docket, of which record and docket the said Thomas V. Cassidy was then and there the custodian, the said Jesse W. Kent, then and there being a citizen of said township, county and state, and being entitled by law to inspect and examine said public record.” That respondent Cannon, upon the filing of such affidavit, issued his warrant for the arrest of petitioner, and that said petitioner was taken before the said magistrate, and, objecting to the jurisdiction of the justice, refused to plead; that the said justice of the peace then entered a plea of not guilty and set the cause down for trial, and that the same is pending before said justice of the peace. It is alleged that he will proceed to try petitioner upon such charge, unless prohibited from so doing. Upon this affidavit the superior court issued an alternative writ of prohibition, and, upon a hearing, a peremptory writ was issued, prohibiting said Cannon from trying the case, or taking further proceedings therein, and taxing costs of ten dollars against him. From this judgment an appeal has been taken.

Counsel for both parties upon this appeal present only the question involved as to the sufficiency of the affidavit to disclose a public offense, it being respondent Cannon’s contention that a justice’s docket is a public record, and that under section 1032 of the Political Code public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state; and he contends that section 176 of the Penal Code is applicable, which provides: “Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment

of such delinquency, is punishable as a misdemeanor." Upon the other hand, it is petitioner's contention that section 1032 of the Political Code guarantees only the right of examination and inspection, and in terms does not provide for the officer in charge of the records to permit or assist or aid in such inspection; that no duty in that regard devolves upon him by law, and claims that a case is presented similar to that of *Ex parte McNulty*, 77 Cal. 165, [11 Am. St. Rep. 257, 19 Pac. 237], in which our supreme court has said that the question whether or not the conduct in question is made a crime must be determined from the language used in the statute; that "constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law." We are of opinion that it is unnecessary to enter into a discussion of this matter. We think it sufficient to say that justices of the peace have jurisdiction of misdemeanors, and that the affidavit filed before the justice in this case was an attempt to set up facts constituting an offense over which the justice had jurisdiction to hear and determine, jurisdiction to determine rightfully or wrongfully. Conceding that his determination as to the sufficiency of the affidavit of complaint was wrong, and that the facts set forth did not show that defendant had committed an offense, nevertheless, he had jurisdiction so to determine. We perceive no difference between this and any other case where a defective information or affidavit of complaint has been filed and the court has erroneously determined the same to be sufficient, in which cases the relief of defendant is not through prohibition, for prohibition only lies where a public officer is proceeding without or in excess of jurisdiction, and no plain, speedy and adequate remedy at law exists. (*Keith v. Recorder's Court*, 9 Cal. App. 380, [99 Pac. 416].) If, as claimed by petitioner, no facts are averred constituting a public offense, he has ample relief through a writ of *habeas corpus*, in the event the justice should find him guilty. The justice, then, in our opinion, not being without or having exceeded his jurisdiction, prohibition does not lie, and the court erred in granting the writ.

Judgment reversed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 30, 1912, and the following opinion then rendered:

THE COURT.—The refusal to perform a public duty amounts to an omission in that regard and is comprehended within section 176 of the Penal Code. One refusing to perform a public duty is amenable to both sections 176 and 772 of the Penal Code. (*Ex parte Keeney*, 84 Cal. 310, [24 Pac. 34].)

Rehearing denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 26, 1912, and the following opinion then rendered thereon:

THE COURT.—The petition for rehearing of this cause in the supreme court is denied.

The grounds stated by the district court of appeal in the brief opinion denying the petition for rehearing in that court states sufficient grounds for the reversal of the judgment. We do not wish to be understood as expressing any opinion as to the doctrines stated in the original opinion of that court.

[Civ. No. 1068. Second Appellate District.—March 1, 1912.]

O. L. ABBOTT, Respondent, v. H. E. KELLOGG and
CARL WITZKE, Appellants.

CONTRACT TO PURCHASE LAND—POSSESSION—TIME OF ESSENCE—FORFEITURE—TENANCY AT WILL—NOTICE—RECOVERY OF POSSESSION—DENIAL OF TITLE OR TENANCY—TRESPASSER.—Where by the terms of a contract to purchase land, under which the purchaser received possession, time was made of the essence of the contract, and it was to be forfeited for nonpayment, and the purchaser was to hold as tenant of the vendor, the purchaser, in such case, becomes a tenant at will of the vendor, who is entitled to thirty days' notice to quit, if he stands upon his contract rights, before he would be subject to an action of unlawful detainer or ejectment; but where, in either

of such actions, he claims equitable ownership under the contract and denies the title of the vendor, or of plaintiff, and denies his own tenancy, the plaintiff may treat him as a trespasser who is not entitled to notice, and may recover the possession.

ID.—EJECTMENT—APPEARANCE—WAIVER OF OBJECTION TO SUMMONS.—

If the action to recover the possession of the premises be treated as one of ejectment in which the defendant appeared, demurred and answered, without any question as to the time required in the summons so to do, he is not in a position in which he can question the sufficiency of the summons under such circumstances.

ID.—LIABILITY FOR USE AND OCCUPATION—AMOUNT PRESUMED CORRECT.

While defendant's entry into possession was lawful, and without liability for rent, as such, under the contract, yet, when the circumstances of the case are such that an action of ejectment will lie, the value of the use and occupation of the premises for the period of possession after the forfeiture was recoverable as damages; and the amount found by the court under the issues presented by the pleadings will be presumed correct, where nothing appears to the contrary.

ID.—FORFEITURE OF CONTRACT RIGHTS—LAW OF CASE.—

It is held that, in view of the decision of the supreme court upon a former appeal, as to all matters involved in the forfeiture of the conditions of the contract upon the part of the defendant, the rulings of the trial court in accordance therewith will not be reviewed upon this appeal.

APPEAL from a judgment of the Superior Court of Kings County, and from an order denying a new trial. John G. Covert, Judge.

The facts are stated in the opinion of the court.

W. R. McQuiddy, for Appellants.

O. L. Abbott, *in pro. per.*, for Respondent.

ALLEN, P. J.—The facts are these: That on or about the third day of December, 1906, one Mallory and H. E. Kellogg, defendant, entered into a written agreement for the purchase and sale of real property in Kings county, under which agreement it was provided that a certain note should be paid on or before October 1, 1909; that certain interest upon other notes should be paid on or before such date; that Kellogg should pay all taxes and charges assessed against the property, as well as water taxes levied, on or before such date; time being made of the essence of the contract. It was further agreed that if the second party should be in default in

the performance of any of the terms and provisions of the agreement, his rights should be at an end, and that if allowed to remain upon said premises thereafter, he should hold and occupy as tenant of the said Mallory. Possession of the premises was given at the time of the execution of the agreement. Kellogg made default in each and all of the obligations of the contract imposed upon him to be performed on or before the first day of October, 1909, and on the fifth day of October following, Mallory gave notice to him that his rights were forfeited under the contract, and that he (Mallory) was going to sell his right to said property. After such notice to Kellogg, Mallory sold the premises to plaintiff, who demanded possession thereof, which was refused, and Kellogg and Carl Witzke, holding under him, continued in possession. Accordingly, on October 18, 1909, Abbott made written demand for the surrender of possession and occupancy of the premises, and upon defendant's failure and refusal to surrender possession within three days thereafter, this action was brought to recover possession. Defendant by his answer denied the seisin and right of possession of plaintiff, and averred an equitable ownership by him in the premises, disclaiming the title of the landlord and of his own relation as tenant. The trial court found the allegations of the complaint to be true, and those allegations touching want of ownership in plaintiff, and the denial of tenancy by defendant, to be untrue; found the valuation of the use and occupation of the premises, after notice, to be \$120, and by its decree put plaintiff in possession and gave judgment for \$120 rent. Defendant appeals from the judgment and from an order denying his motion for a new trial.

Under the allegations of the complaint, and from the express provisions of the contract, defendant, after his default in the performance of the covenants of the agreement, became a tenant at will of Mallory. Being such tenant at will, under section 789, Civil Code, thirty days' notice to remove from the premises within a period of not less than one month was essential to terminate the tenancy, and under section 1161 of the Code of Civil Procedure, when one directly or by subtenant continues in possession of the property, or any part thereof, after the expiration of the term for which it is let, without permission of his landlord, or the successor in estate of his

landlord, if any there be, and if the tenancy be one at will and has been terminated by notice as prescribed in the Civil Code, the action of forcible detainer lies, and the three days' notice to quit after the termination of the tenancy is sufficient to entitle the landlord or owner to maintain an action in unlawful detainer. It is insisted by appellants that this action in unlawful detainer does not lie, because it affirmatively appears that the thirty days' notice provided by the Civil Code to terminate a tenancy at will was not given. "The defendant's answer expressly makes denial of title and of holding possession as tenant, or that plaintiff was entitled to the possession. The effect of this denial was to make the defendant a trespasser. He was not entitled to notice to quit." (*McCarthy v. Brown*, 113 Cal. 19, [45 Pac. 14].) The thirty days' notice to quit not being essential in terminating the tenancy where the same is disclaimed by the tenant, it was not necessary to establish the same in order to give plaintiff the rights guaranteed by section 1161 of the Code of Civil Procedure, or the right to maintain an action in ejectment, in each of which actions the superior court had jurisdiction, and its judgment being correct, will not be disturbed, if its jurisdiction to render the same under the pleadings is established. Treating the action as one in ejectment, defendant appeared, demurred and answered without question as to the time required in the summons so to do, and is not in a position to question the sufficiency of the summons, under the circumstances of the case.

While the entry of defendant was lawful and not for any definite term, or with any liability for rent (*Pomeroy v. Bell*, 118 Cal. 637, [50 Pac. 683]), nevertheless, the value of the use and occupation of the premises, for the period of possession after forfeiture, was recoverable as damages, and the amount thereof found by the court under the issues presented will be assumed to be correct, nothing to the contrary appearing.

All matters involved in the forfeiture on account of the nonperformance of the conditions of the contract upon the defendant's part have been settled and determined adversely to defendant by our supreme court in *Kellogg v. Mallory*, 161 Cal. 526, [119 Pac. 937]. It is unnecessary to review the

rulings of the court with reference to such matters in this proceeding.

We see no merit in the claim of error in denying a new trial on account of the newly discovered evidence disclosed by the affidavits.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 29, 1912.

[Civ. No. 1063. First Appellate District.—March 2, 1912.]

CATHARINE BAKER, Respondent, v. BOARD OF FIRE PENSION FUND COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO, etc., and JAMES E. DILLON, N. GOLDBERG, JOHN DONOHUE, and E. E. PRAEFFLE, as Such Commissioners, Appellants.

FIREMAN'S RELIEF FUND OF SAN FRANCISCO—RIGHT OF WIDOW TO PENSION—MANDAMUS—DEMURRER TO PETITION—DEFAULT OF BOARD—CAUSE OF ACTION.—Where a peremptory writ of mandate to compel payment of a widow's pension out of the Firemen's Relief Fund of the city and county of San Francisco resulted from an order overruling a demurrer of the Board of Fire Pension Fund Commissioners to the petition for the alternative writ, and the default of the board to answer, it is held that the sole question to be determined, upon appeal from the judgment awarding the peremptory writ, is whether upon the admitted facts stated in the affidavit and petition for the writ a cause of action is stated.

Id.—KILLING OF FIREMAN "WHILE IN PERFORMANCE OF DUTY"—SUICIDE WHILE INSANE FROM INJURIES RECEIVED.—Where the affidavit and petition for the writ of mandate show that the deceased husband of the petitioner was a member of the fire department, and that while in the performance of his duty in driving a hose-wagon he received a broken back and other bodily injuries, by the overturning thereof upon him, and that as the result of such injuries he suffered great pain and anguish, which caused him to become

insane, and that while so insane, and because thereof, he killed himself, about two months and a half after such serious injuries, it is held that under these circumstances the fireman was "killed while in the performance of his duty," within the meaning of section 5 of chapter VII, article IX, of the San Francisco charter, and that his widow was entitled to the pension demanded.

ID.—INJURIES PROXIMATE CAUSE OF DEATH.—The injuries received by the fireman may justly be said to have been the proximate cause of his death, and to have set in motion a train of events that, without the intervention of any outside and independent cause, resulted in his death, although his own hand inflicted the wound of which he died, while insane, since the self-inflicted wound was the result of the insanity, which was in turn caused by the injuries, which were thus, in effect, the proximate cause of his death.

ID.—GENERAL RULE AS TO SUICIDE WHILE INSANE.—It is a general rule that a suicide committed while insane is not considered a mere death by suicide within the terms of a contract, and that self-destruction by one bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for that purpose, and was no more his act in the sense of the law than if he had been impelled by an irresistible physical force.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge. The final judgment was rendered in department 7, of which E. P. Mogan is the Judge. It was his decision on demurrer to the petition for the writ which is involved in the opinion on appeal; though in his personal absence, the final peremptory writ appealed from is shown by the record to have been signed by W. M. Conley, Judge, while presiding in that department. Further facts are stated in the opinion of the court.

Percy V. Long, City Attorney, and J. F. English, Assistant City Attorney, for Appellants.

John T. Williams, for Respondent.

HALL, J.—This is an appeal from a judgment granting to plaintiff a peremptory writ of mandate against defendants, upon their refusal to answer after the overruling of their demurrer to plaintiff's petition, requiring defendants to grant, approve and allow a pension to plaintiff, as the widow of one

Frederick Joseph Baker, alleged to have been killed while in the discharge of his duty as a fireman of the city and county of San Francisco.

Section 5 of chapter VII, article IX of the San Francisco charter makes it the duty of the Board of Fire Pension Fund Commissioners to provide a pension in a designated amount, out of the Firemen's Relief Fund, for the widow of any "member or employee of the fire department who may be killed while in the performance of his duty."

The real question to be determined is, Do the admitted facts in the case show that Frederick Joseph Baker, the late husband of plaintiff, was killed while in the performance of his duty?

In this connection it may be noted that respondent claims that it is alleged in the complaint, and so admitted by demurrer, as an ultimate fact that said Baker was killed while in the performance of his duty. However, we think that from the whole record and the connection in which this allegation occurs it should properly be treated as a conclusion drawn by the pleader from the particular facts which are pleaded in detail. For the purposes of this discussion we shall so treat it, and the question then arises, Do the particular facts pleaded show that said Baker was killed in the performance of his duty as a member of the fire department?

In substance, these facts are that on the fifteenth day of June, 1910, said Baker, while in the performance of his duty in driving a hose-wagon, received a broken back and other bodily injuries, by the overturning of said hose-wagon; that as a result of such injuries he suffered great pain and anguish which caused him to become insane, and while so insane and because thereof he killed himself on the third day of September, 1910.

Under these circumstances, can it be said that Baker, within the meaning of the provisions of the charter, was "killed while in the performance of his duty"?

The trial court was of the opinion that he was, and accordingly directed that his widow be allowed the pension provided by law.

Neither side to the appeal has been able to cite to us any authority which may be said to be squarely in point. While

the case is not without difficulty, we think that the decision of the trial court was correct.

The injuries which Baker received may justly be said to have been the proximate cause of his death. They set in motion a train of events, operating from cause to effect, that, without the intervention of any outside and independent cause, resulted in his death.

We say that his death was not brought about by the intervention of any outside and independent cause advisedly, for although his own hand inflicted the wound of which he died, this was not an act for which he was either legally or morally responsible. Upon this phase of the argument the cases holding that suicide or self-destruction while insane does not exempt an insurer from liability under a policy excepting from the risk a death by suicide or the insured's own hand, where the insured commits suicide while insane, are illuminative. (See *Mutual Life Ins. Co. v. Terry*, 82 U. S. 580, [21 L. Ed. 236]; *Breasted v. Farmers' Loan & Trust Co.*, 8 N. Y. 299, [59 Am. Dec. 482]; *Newton v. Mutual Benefit Life Ins. Co.*, 76 N. Y. 426, [32 Am. Rep. 335]; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, [30 L. Ed. 740, 7 Sup. Ct. Rep. 685].)

It has been said that "self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and was no more his act in the sense of the law "than if he had been impelled by an irresistible physical force." (*Accident Ins. Co. v. Crandal*, 120 U. S. 527, [30 L. Ed. 740, 7 Sup. Ct. Rep. 685].)

So in the case at bar, Baker cannot be said to have been the cause, either morally or legally, of his own death. The primary and efficient cause of his death was the dreadful injuries he received. These injuries set in motion a chain of events that, operating in a direct line from cause to effect and without the intervention of any independent force, resulted in his death. His death resulted without the intervention of any independent force, for the self-inflicted wound was the result of the insanity, which was in turn caused by the injuries. The injuries were thus the efficient and proximate cause of his death. "An efficient, adequate cause being found, must be deemed the true cause, unless some other cause

not incidental to it, but independent of it, is shown to have intervened between it and the result." (*Travelers' Ins. Co. v. Murray*, 16 Colo. 296, [25 Am. St. Rep. 267, 26 Pac. 774].)

The conclusion reached by the trial court certainly accords with the general purpose and spirit of the provisions of the charter, which intends a provision for the support of those dependent upon firemen whose death results from a faithful performance of a very hazardous duty. (*Buckendorf v. Minneapolis Fire Department Relief Assn.*, 112 Minn. 298, [127 N. W. 1053, 1133].)

The judgment should be affirmed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1037. Second Appellate District.—March 2, 1912.]

**UNITED STATES FIDELITY & GUARANTY COMPANY,
a Corporation, Appellant, v. FIRST NATIONAL BANK
OF MONROVIA, a Corporation, Respondent.**

COMPLAINT BY SURETY OF GUARDIAN AGAINST BANK—MONEY OF WARD DEPOSITED IN OWN NAME AND EMBEZZLED—CAUSE OF ACTION NOT STATED.—A complaint by the surety of a guardian which states that the guardian received a check upon the defendant bank, payable to the guardian as such, from a former curator of the ward, that said bank took a receipt from the guardian, as such, and sent it to the curator, that the guardian indorsed the check, as such, to defendant bank, with instruction to enter the account in his own name, that he drew out and embezzled the money, and died insolvent, and that the surety was compelled to pay the loss to the ward, but which does not allege that the bank profited in any manner especially by the account, states no cause of action against the bank, and a general demurrer thereto was properly sustained.

ID.—GENERAL RULE—NONLIABILITY OF BANK TO TRUSTEE—LIMITATION. Where no part of a trust fund is received by a bank otherwise than as a temporary deposit to be paid out on checks by the depositor, the general rule is that, in the absence of any law to the contrary, whatever may be said as to the policy of so doing, there is no legal reason which prevents a trustee from depositing the funds of his *cestui que trust* to his individual account, and that the bank may receive such deposit and pay it out in the discharge of its duty to the depositor, subject to the limitation that the

bank, having knowledge of the fiduciary character of the fund, cannot honor checks in its own favor in payment of his personal indebtedness to the bank.

APPEAL from a judgment of the Superior Court of Los Angeles County. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Flint, Gray & Barker, for Appellant.

Shankland & Chandler, for Respondent.

SHAW, J.—The complaint, in so far as essential to a consideration of the question involved, shows that one Henry P. Kenyon was the duly appointed and qualified guardian of the person and estate of Frank C. Kenyon, alias Frank C. Davis, a minor; that for the purpose of enabling Kenyon to qualify as such guardian, pursuant to an order of court, plaintiff duly executed an undertaking in favor of the minor conditioned for the faithful performance of the duties imposed upon Kenyon as such guardian; that on February, 1908, one C. T. Clifford, of Clarksville, Missouri, sent to defendant bank a check reading as follows:

“Clarksville, Mo., Feb. 7, 1908.

“CITIZENS’ BANK.

“Pay to Henry Kenyon, guardian for Frank C. Kenyon, a minor, alias Frank C. Davis, a minor, or order, \$438.14, four hundred thirty-eight and 14/100 dollars.

“C. T. CLIFFORD,

“Curator for Frank C. Davis, a Minor.”

—with instructions to deliver the same to Henry F. Kenyon as guardian of Frank C. Kenyon, alias Frank C. Davis, a minor, upon obtaining his receipt therefor; that the bank delivered the check as instructed and took Kenyon’s receipt therefor as such guardian, and forwarded the same to Clifford; that Kenyon duly indorsed the check as such guardian, presented it to the bank, and requested that it open an account with him in his individual name and when collected place the amount of the check to such account; that the bank collected the amount of the check and, as requested by Kenyon, placed the proceeds thereof to his individual credit, having

knowledge at the time that the money did not belong to him, and that he individually had no right thereto or interest therein, and that his sole right and interest to and in the same was in his capacity as such guardian; that thereafter Kenyon drew his checks upon such account, which checks the bank paid to him personally, or as thereby ordered, the amount so paid out of said fund being \$437.50, all of which belonged to said minor, and for all of which the guardian failed to account or pay over to his ward; that said Henry Y. Kenyon died insolvent, and plaintiff thereafter paid to his successor as guardian of the minor the sum of money so embezzled from the estate of his ward, and which sum, after demand therefor made by plaintiff upon defendant, it refused to pay.

Defendant demurred to the complaint, alleging, among other grounds therefor, the failure to state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff standing upon its complaint, judgment was entered for defendant, from which plaintiff appeals.

In our opinion there was no error committed by the court in sustaining the demurrer upon the ground stated. For our purposes, it may be conceded that plaintiff, as surety for the faithful performance of the duties of Henry F. Kenyon, as guardian, by paying to the estate of the minor the amount due from the estate of the deceased guardian, acquired by operation of law the right of the minor to recover against the estate of the deceased guardian, or, if such right existed in favor of the minor, against the defendant herein. The question, therefore, presented for determination is whether the acts of the defendant bank in connection with the transaction were of a character which rendered it liable to the minor for the loss sustained by the admittedly wrongful acts of his guardian. Appellant has cited numerous authorities in support of its contention that the bank, by reason of accepting the check wherewith it opened an account with Kenyon individually, and when collected placed the amount thereof to his credit in such account, became a party to the fraud and participant in the wrongful acts of the guardian. The extent to which such authorities go in sustaining the contention is sufficiently illustrated by reference to *Carroll Co. Bank v. Rhodes*, 69 Ark. 43, [63 S. W. 68]; *Farmers' etc. Bank v. Fidelity & Dep. Co.*, 108 Ky. 384, [56 S. W. 671]; *Skipwith v. Hurt*,

94 Tex. 322, [60 S. W. 423]; *Boone Co. Bank v. Byrum*, 68 Ark. 71, [56 S. W. 532]; *U. S. F. & G. Co. v. Adoue* (Tex.), [137 S. W. 648]. These cases merely sustain the general principle announced in *Daniel on Negotiable Instruments*, volume 2, section 1612a, that "if a deposit be made in bank to the credit of a certain person as agent or trustee, the use of such terms would charge the bank with notice that the funds were there in a fiduciary relation; it would have no lien upon them for the private debts of the depositor, and if it permitted them to be used for his private purposes in transactions with the bank, it would be bound." The principle is by no means new or novel, having been promulgated with the ten commandments when it was said, "Thou shalt not steal." The decisions to which we have referred, as well as others cited by appellant, wherein it was held the bank was liable to the *cestui que trust* or sureties of his trustee, were based upon admitted facts showing that the bank, with full knowledge that the fund was held in a fiduciary relation, permitted it to be used by the trustee in the payment of a personal debt due from him to the bank, thereby obtaining profits for itself by knowingly participating in the wrongdoing of the trustee. The case at bar is clearly distinguished from the facts upon which such decisions were rendered. Here no part of the fund was received by the bank other than as a temporary deposit thereof, to be paid out on checks as ordered by the depositor. In the absence of a law to the contrary, and our attention is called to none, there is no legal reason, whatever may be said as to the policy of so doing, which prevents a trustee from depositing the funds of a *cestui que trust* in a bank to his individual account. If he possesses the right so to do, it must necessarily follow that the bank has the right to receive the deposit, to his individual account, and, in the discharge of its duty to the depositor, subject to the limitation that the bank, having knowledge of the fiduciary character of the fund, cannot honor checks thereon drawn in its own favor in payment of personal indebtedness due from such depositor to it, pay it out in the usual course upon checks drawn thereon.

It is conceded that the bank upon presentation of the check duly indorsed might properly, and without cause for complaint, have paid the full amount thereof to Kenyon in cash.

This being true, we conceive no reason preventing it with equal propriety from holding it at his request, either as a general or special deposit, subject to his order. The case of *Duckett v. Bank*, 86 Md. 400, [63 Am. St. Rep. 513, 39 L. R. A. 84, 38 Atl. 983], has no application to the facts here involved. In that case the bank, in effect, was instructed to deposit a sum of money, specified in a check payable to its cashier, to the credit of Henry W. Clagett, *trustee*. Instead of following these instructions, it made the deposit to the individual account of Clagett, who squandered the fund. It was held the bank in violating the express instructions participated in the breach of trust by taking the first wrongful step in the spoliation of the trust fund, the result of which was the dissipation thereof. Appellant's contention, if accepted as applicable to the facts presented, would render banks *ex-officio* trustees in general for all *cestuis que trust*. In our opinion, the law does not impose such duties upon banks or other depositaries of trust funds. The complaint discloses no wrongful act in connection with the transaction on the part of the defendant, and there is no pretense that it was the recipient of any part of the fund embezzled by the guardian. It follows from what has been said that the court did not err in sustaining the demurrer upon the ground that the complaint failed to state facts essential to a cause of action.

We deem it unnecessary to discuss other grounds of demurrer interposed.

Judgment affirmed.

Allen, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1912.

[Civ. No. 1065. Second Appellate District.—March 2, 1912.]

J. A. REED, Respondent, v. CHAUNCEY R. HAMMOND,
as Auditor of the County of San Diego, etc., Appel-
lant.

COUNTY OFFICERS—TENURE OF OFFICE AND QUALIFICATIONS—POWER OF LEGISLATURE.—The legislature, subject to the provisions of the constitution, may create county offices, prescribe the tenure thereof, and determine the qualifications required to render one eligible to election or appointment to such office. In addition to the usual county officers, the legislature has provided generally in section 55 of the County Government Act, as codified in section 4013 of the Political Code, that they include "such other officers as may be provided by law."

ID.—ASSISTANT PROBATION OFFICER UNDER JUVENILE COURT LAW A COUNTY OFFICER.—The office of an assistant probation officer, appointed by the superior court of the county, under the juvenile court law, is a county officer, whose tenure and salary is fixed by the law, and made chargeable upon and payable out of the county treasury, and whose qualifications and eligibility for appointment are determined by the general law of the state when not fixed by the constitution.

ID.—NONELIGIBILITY OF WOMEN FOR APPOINTMENT PRIOR TO AMENDMENT OF CONSTITUTION.—Prior to the amendment of the constitution bestowing the elective franchise upon women, a woman was not eligible to appointment as an assistant probation officer under the juvenile court law, since it has been the uniform policy of the general law, prior to that amendment, that no person is eligible to office who is not an elector, "except when otherwise specially provided," there being no provision in the juvenile court law providing for the appointment of a woman to the county office of assistant probation officer, it apparently being a matter of oversight, since women have, by special laws, been made eligible to certain other offices.

ID.—CONSTRUCTION OF LAW AS TO ELIGIBILITY TO COUNTY OFFICE—"TIME OF ELECTION"—APPOINTMENT INCLUDED.—The construction of the law regulating eligibility to a county office, that the officer "must, at the time of his election, be an elector of the county wherein the duties of his office are to be exercised," is to be construed as relating generally to the time of his legal choice to fill the county office, whether the statute provides for an election by the people or for a legal appointment thereto, and the same rule of eligibility applies in either case.

ID.—INELIGIBLE APPOINTMENT OF WOMAN—ERROR IN WRIT OF MANDATE TO AUDITOR—REVERSAL—DESIRABILITY OF WOMAN ASSISTANT—FUTURE INELIGIBILITY REMOVED.—Since the appointment of a woman as assistant probation officer, in this case, was unauthorized by law, notwithstanding the admitted desirability of the services of a woman as assistant probation officer, and though the difficulty in the statute is now removed by the constitutional amendment making women eligible as electors, yet, as the superior court erred in granting a peremptory writ of mandate to the auditor to pay an unauthorized salary, its judgment must be reversed.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

H. S. Utley, District Attorney, for Appellant.

Luce & Luce, for Respondent.

SHAW, J.—This is an appeal from an order of court pursuant to which a peremptory writ of mandate was issued commanding defendant, who was auditor of San Diego county, to issue to Lillie A. Reed, the wife of petitioner, his warrant upon the county treasurer in the sum of \$120, claimed as salary for the month of May, 1911, as assistant probation officer of San Diego county, to which office, on May 1, 1911, she had been appointed pursuant to the provisions of the juvenile court act, approved April 5, 1911.

The sole question involved is whether, prior to the constitutional amendment extending the elective franchise, women were eligible to appointment to the office of such assistant probation officer.

It is unnecessary to cite authority in support of the proposition that the legislature, subject to the provisions of the constitution, may create county offices, prescribe the tenure thereof, fix the salary and determine the qualifications required to render one eligible to election or appointment to such office. Section 55 of the County Government Act (Cal. Gen. Laws [1909], p. 137), as codified in section 4013, Political Code, provides that the officers of a county are the sheriff, auditor, etc., "and such other officers as may be provided

by law." The office of assistant probation officer of San Diego county was one created by the legislature in and for all counties of the seventh class, to which San Diego belongs. The act specified the tenure of office, fixed the salary of the incumbent, and made it chargeable upon and payable out of the county treasury. Clearly, it was a county office; indeed, respondent, upon the authority of *Nicholl v. Koster*, 157 Cal. 416, [108 Pac. 302], concedes it so to be. Section 58, Political Code, as enacted in 1872, provided that "every elector is eligible to the office for which he is an elector, except where otherwise specially provided; and no person is eligible who is not such an elector." In 1891 this section was amended by adding thereto the words, "except when otherwise specially provided." It is apparent that this amendment was by the legislature deemed necessary in order to render effective an amendment, adopted at the same time, to section 792 of the Political Code, whereby women were made eligible to appointment as notaries public. (Stats. 1891, p. 29.) Section 54 of the County Government Act (Cal. Gen. Laws [1909], p. 137), as codified in section 4023 of the Political Code, so far as it concerns the question here involved, was enacted on the same day in 1872 as said section 58 of the Political Code. As originally enacted, it was as follows: "No person is eligible to a county office who, at the time of his election, is not of the age of twenty-one years, a citizen of the state, and an elector of the county in which the duties of the office are to be exercised." While it has been amended from time to time, no change has been made in the requirement that in order to render one eligible to a county office, other than superintendent of schools, school trustee, or member of the board of education, to which a woman may be elected or appointed, he must, at the time of his election, be an elector of the county wherein the duties of the office are to be exercised. In 1907 it was repealed and re-enacted [Stats. 1907, p. 354] as a part of the County Government Act, consisting of two hundred and thirty-four sections.

Respondent contends that the provisions of this section have reference solely and alone to those officers selected by popular vote at an election in which the electors of the county give expression to their choice in filling the office, and not to the county officers selected and designated by appointment. The

case turns on the meaning to be given the words "at the time of his election," as used in the statute. An appointment is generally made by one person, or by a limited number constituting a board or tribunal acting under delegated power, while an election, in the popular sense, is a proceeding wherein all the electors at large participate in the designation of an official, and the one thus chosen to fill the office is said to be elected. In this sense, no incumbent of an office could be said to be elected to an office, in the absence of an election affording an opportunity to the electors to give such expression to their wishes in choosing the official. Hence, under this narrow construction, the fact that while one who was not an elector or citizen, or of the age of twenty-one years, would be ineligible to an office, if elected thereto, nevertheless, the want of any of such qualifications, since there was no "time of his election" to which the possession of the qualifications could relate, would constitute no obstacle to his appointment to fill a vacancy occurring therein. Clearly, it was not the intent of the legislature that such interpretation should be given the statute. Considering the scope of the entire legislative scheme embodied in the County Government Act, and the fact that it provides for the selection of officers both by election and appointment, it is clear to our mind that the purpose of the section before us was to prescribe the qualifications of all county officers, in the absence of the possession of which they are ineligible, and this whether designated at an election in the popular sense of the term, or designated by appointment. "In the construction of a statute, the intention of the legislature is to be ascertained, not so much from the phraseology in which the intent has been expressed, as the general tenor and scope of legislation on the subject." (*People v. Eichelroth*, 78 Cal. 141, [2 L. R. A. 770, 20 Pac. 364]; *Palache v. Pacific Ins. Co.*, 42 Cal. 419.) In our judgment, the words "at the time of his election," as used in the statute, have reference to the time of the selection or designation to the office, and the provision as to eligibility contained in section 4023, Political Code, applies alike to all county officers, whether designated at an election, commonly so termed, or by appointment.

The declared purpose of the juvenile court act is to give to dependent and delinquent children of both sexes care and

discipline approximating as nearly as possible that which should be given by parents. It is impossible to accomplish this purpose in full measure without the aid and assistance of women ready and willing to sacrifice their personal comfort and ease for the good and welfare not only of such dependent children, but for the good of society in general, of which they form an important part. The legislature having this in mind, it is undoubtedly true that its failure to remove the disability of women to fill this important office, in the performance of the duties of which she is peculiarly fitted, was due solely to an oversight. Fortunately, the disability due to the omission on the part of the legislature has been removed by the constitutional amendment extending the franchise, since the adoption of which the ground here urged for denying petitioner compensation for services rendered can no longer furnish a subject for the zeal of those whose duty it is to protect the county treasury from the payment of moneys to persons who under the law are not entitled thereto, and this whether they be alleged officials or extra deputies allowed to county officers.

With great reluctance we are forced to the conclusion that the judgment and order from which this appeal is prosecuted should be reversed, and it is so ordered.

Allen, P. J., and James, J., concurred.

[Civ. No. 1040. Second Appellate District.—March 4, 1912.]

H. M. PAYNE, Appellant, v. P. H. MURPHY, Respondent.

POWER OF LEGISLATURE TO CLASSIFY COUNTIES—LIMITED PURPOSE.—The power conferred upon the legislature by section 5 of article XI of the state constitution to classify counties by population is held to be a power to be exercised for the limited purpose of enabling the compensation of the various officers to be fixed and adjusted.

ID.—CLASS OF SINGLE COUNTY—AMENDMENT OF CODE—CREATION OF COUNTY OFFICE OF STENOGRAPHER—PROVISO—VOID SPECIAL AND LOCAL LEGISLATION.—The amendment of 1911 to section 4256 of the Political Code, relative to the compensation of officers in counties of the twenty-seventh class, which comprises the county of

San Luis Obispo alone, adding a special proviso to section 13 thereof, fixing the compensation of justices of the peace, that in counties of this class a stenographer shall be appointed by the judge of the superior court, with the duties to report the proceedings at preliminary examinations and coroner's inquests, at a salary of \$100 per month, to be paid out of the county treasury, in the same manner and at the same time as other salaries are paid, is not only out of place, as such proviso, but is also unconstitutional and void, as creating a special and local county office, and prescribing the special and local powers and duties of an officer, in violation of subdivision 28 of article IV of the state constitution.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. Robert M. Clarke, Judge Presiding.

The facts are stated in the opinion of the court.

C. P. Kaetzel, for Appellant.

Albert Nelson, S. V. Wright, L. A. Enos, Carpenter & Gibbons, and Lamy & Putnam, for Respondent.

JAMES, J.—In the year 1911 the legislature enacted certain amendments to section 4256 of the Political Code relating to the compensation of officers in counties of the twenty-seventh class. San Luis Obispo was the only county in the state affected by that legislation. Subdivision 13 of the section mentioned was amended to read as follows:

“Justices of the peace, such fees as are now or may be hereafter allowed by law; *provided, however*, that in counties of this class a stenographer shall be appointed by the judge of the superior court in and for such counties, to hold office at the pleasure of said judge, whose duty it shall be to report and transcribe the testimony and proceedings in all preliminary examinations in all of the justices' courts in and for each and every township in said counties, as provided by section 869 of the Penal Code; and whose further duty it shall be to report the testimony and proceedings in all inquests held by the coroner and transcribe the same into long-hand and file a certified copy thereof with the county clerk. Such stenographer shall receive as compensation for his services the sum of \$100 per month to be paid in the same manner and at the same time as the salaries of other officers are paid;

and for all transcripts made as required herein he shall receive the same fees now allowed to phonographic reporters by section 274 of the Code of Civil Procedure; he shall also be allowed his necessary traveling expenses while engaged in the performance of his duties." (Stats. 1911, p. 1165.)

The provisions of this subdivision, wherein it was provided that a stenographer should be appointed by the judge of the superior court, were added by the amendment. Acting under the authority assumed to be given by the amendment, on the 13th of May, 1911, the superior judge of the county of San Luis Obispo appointed appellant herein as stenographer to fill the office so created. Under this appointment, the stenographer proceeded to perform the duties of his office until the sixth day of June, 1911, when he demanded that the auditor deliver to him a warrant for the sum of \$58 in payment of his salary for that portion of the preceding month during which he had served. The auditor refused to draw such warrant, and this proceeding of *mandamus* was brought to compel that officer to comply with the demand of petitioner. A demurrer to the petition was thereafter sustained, without leave to amend, and judgment followed in favor of respondent, from which an appeal has been taken.

The contention of respondent is that the act in question is special in its nature and violative of the prohibition of the constitution in that regard. It seems to be conceded by all parties that the power of the legislature to classify counties by population is a power to be exercised for the limited purpose of enabling the compensation of the various officers to be fixed and adjusted. The constitution, in section 5 of article XI, seems to make that proposition very clear, and our supreme court has so held in a number of cases, of which we cite: *Pratt v. Browne*, 135 Cal. 649, [67 Pac. 1082]; *Sanchez v. Fordyce*, 141 Cal. 427, [75 Pac. 56]. If the effect of the amendment referred to was to create an office, which office is made one special to counties of the twenty-seventh class alone, then the objection of respondent that such legislation is unconstitutional must be sustained. We think that no other construction can be given to the language used by the legislature. The stenographer was one to be appointed by the judge of the superior court, and he was to "hold office at the pleasure of said judge," and "receive as compensation for

his services the sum of \$100 per month, to be paid in the same manner and at the same time as the salaries of other officers are paid." It cannot be said that the intent was merely to provide assistants to the justices of the peace, and so affect the matter of their compensation, which would be a proper subject for special act applying alike to all counties of the same class. The justices of the peace had been already by general law given authority to employ a reporter to report proceedings had at preliminary examinations of persons charged with crime and to fix his compensation, which when so fixed became a county charge. (Pen. Code, sec. 869.) It is true that one of the duties of the stenographer was to report testimony and proceedings at coroner's inquests, and that this was a duty which had theretofore been imposed upon the coroner and for which he was required to pay out of the inquest fee allowed him. To this extent it may be said that the compensation of the coroner was affected by the amendment, but the subject matter of the amendment taken as a whole indicates very clearly that it was the design to create an office. The superior judge of the county is called upon to make the appointment, and not the officer under whom the stenographer is required to render service, and the term of office is provided to be during the pleasure of the appointing power, and a salary is affixed which is to be paid in the same manner as the salaries of other county officers are paid. The amendment seems to have had no proper place under a subdivision treating alone of fees to be paid to justices of the peace. Subdivision 28 of section 25 of article IV of the constitution of the state provides that the legislature shall not pass local or special laws creating offices or prescribing the powers and duties of officers in counties. We are of opinion that the amendment under consideration is properly subject to the objection made by respondent, in that it creates an office by special law not authorized under the constitution.

The judgment is affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 3, 1912.

[Civ. No. 1082. Second Appellate District.—March 4, 1912.]

WILLARD A. HELMER, Appellant, v. HENRY B. PARSONS, EMIL FIRTH, and TITLE INSURANCE AND TRUST COMPANY, a Corporation, Respondents; THOMAS G. CHAPPLE et al., Defendants.

MORTGAGE—PURCHASE OF SECURED NOTE—NON-NEGOTIABILITY—SUBJECTION OF PURCHASER TO DEFENSES—PAYMENT OF FACE WITHOUT KNOWLEDGE IMMATERIAL.—A note which shows on its face that it is secured by a mortgage is non-negotiable, and notice of such non-negotiability is thereby imparted to a purchaser thereof, and he is chargeable with notice that if the maker has any defense against the original payee, he takes the note subject to such defense, and it is immaterial that he has paid the full face of the secured note to the original payee, without actual notice of any defense thereto.

Id.—ASSIGNMENT OF MORTGAGE—DUTY OF PROPOSED ASSIGNEE TO INQUIRE AS TO DEFENSES—EFFECT OF NEGLIGENCE.—One who is about to take an assignment of a mortgage is in duty bound, in protection of his own interest, to make inquiry of the mortgagor as to the validity of the instrument and of the transaction on which it is founded and as to the amount due, and whether the mortgagor has any defense or setoff to interpose against it. But if he neglects to make such inquiry, he takes the mortgage subject to all defenses against the original mortgagee, and is charged with knowledge of all facts which such an inquiry would have disclosed.

Id.—CONSTRUCTION OF CODE PROVISIONS—INDORSEMENT OF NON-NEGOTIABLE INSTRUMENT—ASSIGNMENT OF THING IN ACTION.—Section 1459 of the Civil Code, making the transfer of a non-negotiable instrument "subject to all equities and defenses existing in favor of the maker at the time of the indorsement," and section 368 of the Code of Civil Procedure, providing that, "in the case of an assignment of a thing in action [not negotiable] the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment," are to be construed as though passed at the same moment of time and as parts of the same statute; and the law as declared by the two sections is that a defendant may avail himself of any setoff or defense acquired before notice of assignment of any non-negotiable cause of action.

Id.—PARTIAL FAILURE OF CONSIDERATION OF NOTE AND MORTGAGE EXISTING AT TIME OF TRANSFER—NOTICE OF ASSIGNMENT IMMATERIAL.—Where the payee of a note and mortgage for \$3,500 agreed to advance that full sum to the mortgagor in specified installments, but only advanced the total sum of \$1,250, the partial

failure of consideration as to the residue of the note and mortgage being a complete defense as to the residue against the original payee, which existed at the time of the transfer of the note and mortgage by the payee to the plaintiff, it would be a like defense as against the plaintiff, as assignee, which cannot be affected by any notice of the assignment given by the assignee to the defendant.

ID.—RECORDING OF ASSIGNMENT OF MORTGAGE NOT CONSTRUCTIVE NOTICE TO MORTGAGOR.—The mere recording by the assignee of the assignment of the mortgage only operates, under section 2934 of the Civil Code, as notice to all persons subsequently deriving title to the mortgage from the assignor, and constitutes no constructive notice of the assignment to the mortgagor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

Frank G. Bryant, for Appellant.

Elmer R. McDowell, E. Earl Crandall, and William Hazlett, for Henry B. Parsons, Respondent.

Sheldon Borden, and George H. Moore, for Emil Firth and Title Insurance and Trust Company, Respondents.

SHAW, J.—Action to foreclose a mortgage given to secure the payment of a promissory note in the sum of \$3,500.

It appears from the findings that on December 4, 1908, defendant Parsons executed and delivered to one L. E. Jones a note and mortgage which was made the subject of the action; that upon delivery thereof Jones paid to Parsons the sum of \$1,000, agreeing orally to pay him \$1,000 in ten days, and the balance in thirty-five days; that on February 11, 1909, Jones paid to Parsons an additional \$250, making in all \$1,250, and no more, received by Parsons in consideration of the note and mortgage; that prior to the making of this last payment, to wit, on December 29, 1908, Jones sold and, by an instrument executed in writing and duly recorded, transferred the note and mortgage to plaintiff, who paid Jones the full face value thereof; that plaintiff acquired the note and mortgage without notice of any existing equities or defenses

thereto. Upon these findings the court gave plaintiff judgment for \$1,250 and interest, from which he prosecutes this appeal, claiming that judgment should have been entered thereon for the full face value of the note.

As the note was secured by a mortgage, it was non-negotiable (*Meyer v. Weber*, 133 Cal. 681, [65 Pac. 1110]; *Trinity County Bank v. Haas*, 151 Cal. 553, [91 Pac. 385]); and as this fact appears upon its face, notice of such non-negotiability was thereby imparted to plaintiff, who, as a matter of law, was chargeable with notice that if the maker thereof had any defense thereto as against Jones, he (plaintiff) took it subject to such defense. (*Mohr v. Byrne*, 135 Cal. 87, [67 Pac. 11]; *Bouche v. Louttit*, 104 Cal. 230, [37 Pac. 902].) In protection of his interest, the duty devolved upon plaintiff to make inquiry of the mortgagor as to the validity of the instrument and existing equities which might be pleaded in defense of a recovery. Had he done so, and defendant had stated, as Jones is found to have done, that the note was valid and he (defendant) had no defense thereto, then the maxim here invoked by appellant, that "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer" (Civ. Code, sec. 3543), would apply. (*Briggs v. Crawford*, 162 Cal. 124, [121 Pac. 381].) "One about to take an assignment of a mortgage is bound in his own interest to inquire of the mortgagor as to the validity of the instrument and of the transaction on which it was founded and as to the amount due, and whether the mortgagor has any defenses or setoffs to interpose against it. If he neglects to do this, he takes the mortgage subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee, being charged with knowledge of all facts which such an inquiry would have disclosed." (27 Cyc., p. 1324.) Appellant invokes section 1459 of the Civil Code, as follows: "A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement." He insists that, inasmuch as there was no breach on the part of Jones in the payment of

the \$1,000 which was not to be paid until thirty-five days from the date of the making and delivery of the note, there was no defense existing as to such sum in favor of the maker at the time when plaintiff acquired the note on December 29th. Section 368 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity." In the case of *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, [35 Pac. 876], the court said: "These two sections must be construed as though they had been passed at the same moment of time, and were parts of the same statute . . . and the law as declared by the two sections is that a defendant may avail himself of setoff acquired before notice of assignment, provided the setoff be in other respects good." The partial failure of consideration for the note would have been a complete defense to the extent of such failure in an action instituted by Jones to foreclose the mortgage. It was a defense existing at the time of the transfer, and since, under the statute, the action by the assignee is declared to be without prejudice to defenses existing at the time of the assignment, it follows that the right to interpose such defense could not be affected by notice of the assignment given defendant. Moreover, even conceding, as claimed by appellant, that the defense based upon the failure of consideration due to default in payment of the promised \$1,000 could be affected by notice of the transfer, nevertheless, no notice of the transfer, other than the recording of the instrument, was given. The mere recording of the assignment constituted no notice to defendant of the assignment to plaintiff. Section 2934 of the Civil Code provides that, "an assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." Defendant, however, was not a person deriving title to the mortgage from any assignor thereof, and hence was not one chargeable with constructive notice of its transfer by the recording of the assignment. "The provision about the recordation of an assignment of a mortgage is in section

2934. and the provision is that such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." (*Adler v. Sargent*, 109 Cal. 42, [41 Pac. 799].) And in *Murphy v. Barnard*, 162 Mass. 72, [44 Am. St. Rep. 340, 38 N. E. 29], it is said: "A mortgagor is not chargeable with constructive notice by the record of an assignment of the mortgage." (See, also, *McCabe v. Grey*, 20 Cal. 509.) While we deem the question of notice in the case at bar as unimportant, for the reason given, nevertheless, we are of opinion that the mere recording of the assignment was insufficient to constitute notice of such fact.

The judgment is affirmed.

Allen, P. J., and James, J., concurred.

[Civ. No. 1068. Second Appellate District.—March 4, 1912.]

C. P. SCHERMERHORN, Administrator With Will Annexed of Estate of E. B. OSBORNE, Deceased, Substituted for E. B. OSBORNE, Respondent, v. LOS ANGELES PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, Appellant.

NEGLIGENCE—COLLISION OF AUTOMOBILE WITH CAR—ACTION FOR PERSONAL INJURIES—PRIOR RECOVERY FOR INJURY TO AUTOMOBILE NOT A BAR.—An action to recover damages for personal injuries resulting from the negligent collision of defendant's railroad car with plaintiff's automobile, in which he was riding at the time of the collision, is not barred or affected by the recovery in a prior action for damages to plaintiff's automobile, resulting from the same collision. Where damage has been caused to the person and property of the plaintiff by the same tortious act of the defendant, separate actions may be brought for the injury so resulting.

ID.—PLEADING—JOINDER OF CAUSES OF ACTION—INJURIES TO PERSON AND PROPERTY—CONSTRUCTION OF CODE PROVISION.—A plaintiff, under section 427 of the Code of Civil Procedure, may unite several causes of action, where they all arise out of injuries to the person, or where they all arise out of injuries to property, and it is expressly provided in such section that the "causes of action so united must all belong to one only of these classes." It has been held, in construing such code provision, that causes of

action for damages to person and property, based upon a forcible trespass as the wrongful cause, could not be united in one action.

ID.—PRIOR ADJUDICATION—FAILURE TO PLEAD DEFENSE—WAIVER OF OBJECTION.—It is another sufficient answer to the objection that the cause of action for personal injuries is barred by the prior recovery of damages resulting to the plaintiff's automobile from the same negligence herein alleged, that no plea of any prior adjudication is raised in the answer of the defendant. It was incumbent upon the defendant, if intending to rely upon such prior adjudication as a bar to any recovery in this action, to plead that defense in his answer, and the objection is waived by his failure so to do.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

J. W. McKinley, and W. R. Millar, for Appellant.

John M. York, for Respondent.

JAMES, J.—Plaintiff in this action suffered personal injuries through the occurrence of a collision between an automobile in which he was riding and a car of defendant company. He brought a separate action to recover damages sustained by reason of the injury to his automobile, in which judgment was rendered in the sum of \$700. This action, being one to recover for the personal injuries suffered, came to trial after judgment had been rendered and satisfied in the first-mentioned cause. In the course of the trial of this action the plaintiff offered in evidence the judgment-roll in the other action referred to for the purpose of showing an adjudication of some of the facts involved in the cause then on trial, which evidence was admitted by the court. The jury found that plaintiff had been damaged in his person in the sum of \$6,000, and judgment was entered accordingly. On this appeal but one point is made in support of the contention of appellant that a reversal should be ordered: It is insisted that where damage has been caused to the person and property of an individual by the same tortious act committed by another, separate actions cannot be brought to recover the different damages so resulting, and that as it appeared in this

action that plaintiff had recovered judgment, which had been satisfied, as to the injury suffered by damage to his automobile, he was barred from any further recovery on account of damages of any kind which may have been caused him by the same negligent act of defendant. There are two very conclusive answers to be made to this contention: First, it is expressly provided by section 427 of the Code of Civil Procedure that the plaintiff may unite several causes of action, where they arise out of "6th, injuries to person, 7th, injuries to property"; and "the causes of action so united must all belong to one only of these classes." In construing this provision of the code, it has been held that causes of action for damages to person and property, based upon a forcible trespass as the wrongful cause, could not be united in one action. (*Lamb v. Harbaugh*, 105 Cal. 680, [39 Pac. 56].) The case of *Thelin v. Stewart*, 100 Cal. 372, [34 Pac. 861], is also in point. The second answer that may be made to the contention of appellant is that nowhere in the course of the proceeding had in the trial court was the objection which is here made raised. It was incumbent upon the defendant, if it intended to rely upon the adjudication of the claim for damages caused to the automobile of plaintiff as a bar to a recovery here, to have pleaded that defense in its answer. This it did not do.

The judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 3, 1912, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 3, 1912.

[Civ. No. 1009. Second Appellate District.—March 5, 1912.]

JOHN R. POOLE, Respondent, v. GRAND CIRCLE WOMEN OF WOODCRAFT, a Corporation, Appellant.

LIFE INSURANCE—ACTION ON POLICY BY BENEFICIARY—STATEMENTS IN APPLICATION—ABSENCE OF "ILLNESS" SINCE CHILDHOOD—PHYSICIAN NOT "CONSULTED."—An action upon a policy by a husband as the beneficiary of his wife, whose statements made in her application for the policy were that she had "not been confined to the house by illness since childhood," or "consulted a physician since that time," is not defeated by mere evidence of a physician that two years before the application he had treated her, when confined temporarily "from a cold, with a temporary difficulty during menstruation," that he gave her a little medicine, and that she got better "right away," and that afterward "he gave her a general tonic to build her up and give her an appetite."

ID.—DEFINITION OF "ILLNESS" AS USED IN POLICY.—The word "illness," as used in the policy, must be construed to mean something more than a mere indisposition due to a temporary cold, accompanied by a painful menstrual period. That word, as used, means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system. "Illness" relates to matters which have a sensible, appreciable form, and applies ordinarily to matters of a substantial character, and not to a slight and temporary indisposition, speedily forgotten.

ID.—"CONFINEMENT TO HOUSE BY ILLNESS"—DISREGARD OF "TRIFLES." Remaining in the house for a few hours as the result of a cold, or other temporary indisposition, cannot be construed as "confinement to the house by illness." Applying the maxim embodied in section 3533 of the Civil Code, that "The law disregards trifles," the evidence wholly fails to show that the statement made by the applicant to the effect that she had not been confined to the house by illness was untrue.

ID.—QUESTION AS TO "CONSULTATION OF PHYSICIAN"—CONSTRUCTION.—A reasonable construction of the question as to whether the insured had "consulted a physician" implies that it should be interpreted as relating to a consultation as to some disease or illness with which the applicant was or had been afflicted, and not to some feeling of trivial discomfort or temporary indisposition not affecting the general health.

ID.—SUPPORT OF FINDING AGAINST BREACH OF WARRANTIES.—Even if the statements made in the application for the policy be considered as warranties, it is sufficient to say that the finding of the

court that there was no breach of said warranties is fully sustained by the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County. F. E. Densmore, Judge Presiding.

The facts are stated in the opinion of the court.

John H. Foley, for Appellant.

Charles S. Burnell, for Respondent.

SHAW, J.—Plaintiff, as the surviving husband of Gertie S. Poole, deceased, sues to recover upon a life insurance policy which had been issued to his wife by defendant, and wherein he was made the beneficiary. Judgment went for plaintiff, from which defendant appeals.

The policy was issued on October 26, 1908, upon an application therefor signed by the applicant on September 19, 1908. Defendant resists payment upon the ground of an alleged breach of warranty, in that certain statements made in the application, and which are claimed to constitute strict warranties, were untrue. Counsel for the respective parties devote a large part of their briefs to a discussion of the question as to whether statements made by the applicant should be construed as strict warranties. A determination of such question, however, is not essential to a decision of the appeal. Appellant's contention in this regard may be conceded. The question then arises, Were the statements untrue? The trial court found they were true; hence, if this finding is sustained by the evidence, the judgment must be affirmed upon the ground that there was no breach of the alleged warranties.

The questions and answers thereto alleged to be false are as follows: "Q. When were you last confined to the house by illness? A. Not since childhood, three and one-half years old. Q. When did you last consult a physician? A. Not since childhood. Q. Have you now, or have you had, any illness, disease, or injury not mentioned in the foregoing questions and answers? A. No. Q. Is the menstruation regular and normal? A. Yes. Q. Have you ever had any inflammation or other disease of the ovaries or tubes? A. No." Gertie S. Poole died on February 21, 1909. At

the trial, Dr. Bacon, the physician who attended deceased in her last illness, was called as a witness and testified that, some two years prior to the making of the application for insurance by deceased, he made one visit to her, at which time she was confined to her bed, suffering from an acute cold, and as a result of which there was temporary difficulty during the menstrual period; that he gave her a little medicine and she got better right away; that on October 1st following she called at his office, when he made an examination and found everything normal, except that the womb was a trifle small and a little bit sore, due to the congestion resulting from the cold; that early in 1907 he gave her a general tonic to build her up and give her an appetite. There is no evidence, other than the fact that when the physician called at her house he found her in bed, that the insured was ever confined to her house by illness. Whether her being in bed at the hour of his call was due to the cold with which she was afflicted is not made to appear. Indeed, for aught that is shown by the evidence, she may have been in bed only during the time of his single visit, and at what time in the day this occurred is not shown. He says he could not say how long she was confined to the house. Moreover, "illness," as here used, must be construed as something more than a mere indisposition due to a temporary cold, accompanied by a painful menstrual period. "'Illness,' as used, means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system, . . . and not a mere temporary indisposition, which does not tend to undermine and weaken the constitution of the insured." (*Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, [41 Atl. 518].) A cold is "not to be construed as importing an absolute freedom from any bodily ailment, but rather as freedom from such ailments as would ordinarily be called disease or sickness." (*Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587, [60 Am. Rep. 661, 9 Atl. 766].) Illness "relates to matters which have a sensible, appreciable form, . . . and applies ordinarily to matters of a substantial character," and not to a slight and temporary indisposition, speedily forgotten. (*Hubbard v. Mutual Reserve Fund Life Assn.*, 100 Fed. 723, [40 C. C. A. 665].) Remaining in the house for a few hours, or abstaining from the labors of one's usual calling, owing to a temporary cold or headache, cannot

be construed as "confinement to the house by illness." Applying the maxim, "The law disregards trifles" (Civ. Code, sec. 3533), the evidence wholly fails to show the statement made by the applicant, to the effect that she had not been confined to the house by illness, to be untrue.

What we have said is equally applicable to the alleged untrue statement that she had not consulted a physician. A reasonable construction of the question implies that it should be interpreted as relating to a consultation as to some disease or illness with which the applicant was or had been afflicted, not to some feeling of trivial discomfort or temporary indisposition not affecting the general health.

The right of a beneficiary to recover upon an insurance policy, the application for which contains a statement that the applicant has not consulted a physician since childhood, should not be defeated by evidence that years before the date of his application he consulted a physician as to a headache due to an over-libation at a banquet and was advised to visit a soda-fountain and drink a bromo-seltzer. We concur with the learned trial judge that, if the facts presented constitute a defense to the plaintiff's right to recover, very few life insurance policies justify the faith therein of their holders.

Upon the theory contended for by appellant, that the statements made constitute strict warranties, the finding of the court that there was no breach of said warranties is fully sustained by the evidence.

The judgment is affirmed.

Allen, P. J., and James, J., concurred.

[Civ. No. 1056. Second Appellate District.—March 5, 1912.]

COUNTY OF SAN DIEGO, Appellant, v. SOLON BRYAN,
Respondent.

JUSTICE OF THE PEACE—SALARY IN FULL COMPENSATION—FEES FOR SOLEMNIZATION OF MARRIAGES—DUTY OF PAYMENT INTO COUNTY TREASURY.—A justice of the peace of a township in a county of the ninth class, which has a population of sixteen thousand or more, and who, under subdivision 15 of section 4238 of the County Gov-

ernment Act, is entitled to a salary of \$150 per month in full of all compensation in both civil and criminal cases, and which, under sections 4290 and 4292 of that act, is in full compensation for services of every kind and description, is not entitled to retain fees paid to him for the solemnization of marriages not expressly authorized to be retained by law, but is in duty bound to pay the same into the county treasury.

ID.—EXPRESS AUTHORITY OF LAW TO RETAIN FEES ESSENTIAL—RULE OF STRICT CONSTRUCTION.—In order that any fees allowed by law may be retained, and not paid over into the county treasury, such retention must be expressly authorized by law; and where the enactment in regard thereto admits of two constructions, the rule of strict construction against the claimant and in favor of the county government is applicable.

ID.—ERROR IN DENYING WRIT OF MANDATE.—It is held that the superior court erred in denying a peremptory writ of mandate to compel the justice of the peace to perform his duty to pay such fees into the county treasury, and that the judgment must be reversed, with directions to issue such peremptory writ.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

H. S. Utley, District Attorney, for Appellant.

Adam Thompson, J. C. Hizar, and Hunsaker & Britt, for Respondent.

ALLEN, P. J.—This is an appeal from the judgment of the superior court of San Diego county denying a peremptory writ of *mandamus* directing the defendant to pay into the county treasury of said county money received by him as a justice of the peace for solemnizing marriages.

The only question presented upon the appeal involves the right of the defendant as such justice to retain as his own such fees, it not being disputed that if such fees belong to the county the proceeding sought is an appropriate one. The defendant, a justice of the peace, was elected and inducted into office since the adoption of the County Government Act, as amended in 1909. San Diego by said act is made a county of the ninth class. Section 4238 of such County Government Act [Pol. Code] provides: "In counties of the ninth class the

county officers shall receive as compensation for the services required of them by law, the following salaries, to wit: . . . 15. Justices of the peace, in all townships having a population of sixteen thousand or more, one hundred and fifty dollars per month, in full of all compensation in both civil and criminal cases." The answer admits that the population of San Diego township is such as to bring respondent within this limitation as to salary; his contention, however, being that the solemnizing of a marriage is neither a civil nor a criminal case, and therefore the fees received by him are his personal property. The authority of a justice of the peace to solemnize marriages is conferred by section 70 of the Civil Code. Section 4290 of the County Government Act provides: "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title, either as officers, *ex-officio* officers, their deputies and assistants, unless in this title otherwise provided," with certain exceptions not here applicable. This section seems to us to comprehend all of the fees received for services rendered in an official capacity, whether performed in a strictly civil or criminal case, or otherwise. We are not of opinion that a proper construction of the County Government Act confers upon a justice of the peace of the township named the right to retain as his own any fees received by him in his official capacity. In *County of Humboldt v. Stern*, 136 Cal. 63, [68 Pac. 324], in construing the County Government Act of 1897, and that portion thereof identical with section 4290, the supreme court says: "This provision is a legislative declaration that the officers shall not receive any compensation from the county other than the salaries therein named for any services they may render it, either in the line of their official duty or otherwise. . . . If he is of the opinion that the services asked of him are not within the line of his official duty, he can decline to perform them, but if he performs such services, he cannot afterward insist that it was not a part of his official duty and claim a compensation therefor." By analogy, when an officer performs an act the sole authority for which performance rests upon his official position, he may not insist that the same when performed is not an official act. The County Government Act provides—section 4292—that all salaried officers of the several

counties and townships of this state shall charge and collect for the use of their respective counties, and pay into the county treasury, on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except where such fees, or a percentage thereof, is allowed such officers, and excepting also such fees as are a charge against the county. The allowance of such fees, in order that they may be retained by the officers, must be specially provided by law. The rule of strict construction in favor of the government as against a claimant for extra compensation, where the enactment in reference thereto admits of two constructions, is applicable here. (*Irwin v. County of Yuba*, 119 Cal. 686, [52 Pac. 35], and cases cited.) We do not regard the case of *City of St. Louis v. Sommers*, 148 Mo. 398, [50 S. W. 102], as an authority in point. In that case the statute only provided that the salary should be received in full of services performed in court; in other words, for strictly judicial duties. The code provisions of this state under consideration are to the effect that such salary shall be in full of all services of any and every kind rendered.

We are of opinion that the court erred in its judgment denying the writ, and the same is reversed, with instructions to issue a peremptory writ of mandate commanding and directing the respondent forthwith to pay into the county treasury the fees collected for solemnizing marriages during his present term of office.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 3, 1912.

[Civ. No. 1122. Second Appellate District.—March 5, 1912.]

CHARLES E. BEHYMER, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, HONORABLE GEORGE H. HUTTON, Judge Thereof, Respondent.

APPEAL FROM JUSTICE'S COURT—RULE OF SUPERIOR COURT REQUIRING DEPOSIT OF CLERK'S COSTS—PROPER GROUND FOR DISMISSAL.—The superior court may by rule reasonably require an appellant from the justice's court within thirty days after the filing of the transcript upon appeal to deposit with the clerk the sum of six dollars for his costs upon the appeal, under penalty for failure to do so of a dismissal of the appeal, upon motion after notice to the appellant.

ID.—DEPOSIT OF COSTS AFTER NOTICE OF MOTION TO DISMISS—EXCUSE FOR DELAY—COUNTER-AFFIDAVIT—DISCRETION NOT ABUSED.—Where after default of the appellant, and notice of motion to dismiss, the appellant deposited the costs and urged as an excuse for the delay the purpose of appellant's counsel to comply with the rule, and forgetfulness, owing to his weakened physical condition after an operation by a physician, rendering him for a time unfit to transact business, but it was shown by a counter-affidavit that appellant's counsel stated as a reason for not complying with the rule that appellant had not paid him the costs, and that he had refused to advance the same for his client, it cannot be said that the court abused its discretion in dismissing the appeal.

ID.—GROUND FOR RELIEF UNDER SECTION 473 NOT SHOWN—WRIT OF MANDATE DISALLOWED.—Where it appears from the affidavit of appellant's counsel that he was familiar with the rule requiring the deposit of costs within thirty days, and that he intended to pay the same, and there was a conflict in the evidence as to his excuse for not paying the same, the showing is not such as would entitle the plaintiff to relief under section 473 of the Code of Civil Procedure; nor is he entitled to a writ of mandate to compel the superior court to set aside the order dismissing the appeal and to entertain the same.

APPLICATION for a peremptory writ of mandate to the Superior Court of Los Angeles County. Geo. H. Hutton, Judge.

The facts are stated in the opinion of the court.

C. Beeson Sweet, for Petitioner.

Richard A. Dunnigan, for Respondent.

SHAW, J.—Application for a peremptory writ of mandate commanding the superior court and the Honorable George H. Hutton, judge thereof, to vacate and set aside an order dismissing an appeal from a judgment rendered in the justice's court in an action wherein one O. W. Hobbs was plaintiff and petitioner was defendant.

The judgment from which the appeal was taken was rendered on September 26, 1911, on which date defendant served his notice of appeal and filed the required undertaking, which action was followed, on October 3, 1911, by depositing with the clerk of the superior court a transcript of the justice's docket and the files and papers required upon hearing the case on appeal. The order of dismissal was made upon a motion based upon the ground that appellant had failed and neglected to pay to the clerk of the court the sum of six dollars as a deposit for costs, as required by rule 27 of the superior court, which is as follows: "In any civil action appealed from an inferior court, if the transcript and papers are not filed in the clerk's office and six dollars paid to the clerk as a deposit for costs, within thirty days after the notice of appeal and undertaking on appeal are filed in such inferior court, such appeal will be dismissed on motion made upon notice to the appellant." That such requirement is a reasonable one and the court authorized to adopt the rule, is unquestioned. (Code Civ. Proc., sec. 129.) The notice of the motion was given on November 3, 1911, and on the day following, some thirty-nine days after taking the appeal, appellant paid the fee of six dollars as a deposit for costs, thus for the first time perfecting his appeal. Clearly, he was in default, and unless entitled upon the showing made to relief under section 473, Code of Civil Procedure, the writ should not issue. An examination of the affidavits presented at the hearing of the motion fails to disclose any abuse of discretion on the part of the court in denying the appellant relief upon the ground of mistake, inadvertence, surprise, or excusable neglect. Indeed, it appears from the affidavit of petitioner's attorney that he was familiar with rule 27 and the requirement that the costs should be paid within thirty days, and while conversing with respondent's attorney as to

paying the costs of the appeal, he expressed himself as being opposed to paying the same, he, nevertheless, on September 26, 1911, the day on which the appeal was taken, at petitioner's request, promised to pay the costs upon his client's promise to come to his office and pay them later; that petitioner's attorney, according to his affidavit, "fully intended to pay said costs and neglected to do so solely because of forgetfulness brought about by his physical condition," due to the fact that on September 28, 1911, he submitted to a minor surgical operation, and during all of the time from September 26th to November 4th worked under physical difficulties due to nervousness resulting from said operation, by reason whereof, according to the affidavit of the physician, "he suffered discomfort and distress which rendered him unable to properly attend to his business affairs." It further appears from a counter-affidavit filed, that on November 4th petitioner's attorney, in conversation with the attorney for respondent, assigned as a reason for noncompliance with said rule the fact that appellant had not paid to him the said costs, and that he personally refused to advance the same for his said client. Not only does it appear there was a conflict in the evidence as to the reason for appellant's neglect and failure to pay the costs necessary to perfect his appeal, but, even if uncontradicted, the showing made by appellant fails to exhibit facts upon which this court would be justified in holding the trial court abused its discretion in making the order complained of. The case of *Kraker v. Superior Court*, 15 Cal. App. 651, [115 Pac. 663], upon which petitioner relies, has no reference to the facts under review. It differs from this in the fact that the appeal there had been perfected in all respects as required by law within the time allowed therefor, whereas, in the case at bar, the appeal was not perfected by paying the fees required as a condition of filing the papers until after the expiration of the time prescribed therefor.

The writ is denied.

Allen, P. J., and James, J., concurred.

[Civ. No. 949. First Appellate District.—March 7, 1912.]

CREDIT CLEARANCE BUREAU, a Corporation, Appellant, v. **WEARY & ALFORD COMPANY**, a Corporation, Respondent.

APPEAL—ORDER VACATING DEFAULT JUDGMENT—HEARING UPON AFFIDAVITS—INSUFFICIENT AUTHENTICATION BY CLERK—AFFIRMANCE OF ORDER.—An order vacating a default judgment, which was heard and determined upon affidavits, must be affirmed where the only record prepared for use upon the appeal is a purported transcript of the judgment-roll, the notice of motion to set aside the judgment, and affidavits used upon the hearing certified alone by the clerk of the trial court, which cannot be considered.

ID.—ALTERNATIVE MODE OF PERFECTING APPEAL—CERTIFICATE OF JUDGE ESSENTIAL.—To perfect such an appeal, the appellant must adopt either the method prescribed by sections 953a, 953b and 953c of the Code of Civil Procedure, or that prescribed by rule XXIX of the supreme court. In either of such methods, the record must be examined and authenticated by the trial judge, who knows what papers were used at the hearing. It is not for the clerk to determine what papers the court acted upon in setting aside the default judgment.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating and setting aside a judgment by default. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

L. H. Melsted, and Edwin H. Williams, for Appellant.

Stratton & Kaufman, for Respondent.

KERRIGAN, J.—This is an appeal from an order vacating and setting aside a default judgment.

The defendant objects to the hearing of the appeal on the ground that no properly authenticated record has been filed in this court.

The clerk of the trial court prepared what purports to be a transcript for the use of this court upon the appeal, certifying that it contained a full, true and correct copy of the judgment-roll, notice of motion to set aside the default, and affidavits used on the hearing. It has been held, however, in

several cases that this authentication is insufficient. Here the appeal is from an order heard and determined upon affidavits. To perfect such an appeal it was necessary for the appellant to adopt either the method prescribed by sections 953a, 953b and 953c of the Code of Civil Procedure or that prescribed by rule XXIX of the supreme court. (144 Cal. lii, [78 Pac. xii].) If either of such methods had been pursued, the record would have been examined and authenticated by the trial judge—the person who knew what papers were used upon the hearing of the motion. As was said in *Walsh v. Hutchings*, 60 Cal. 228, "It is not for the clerk to determine what papers or evidence the court acted upon."

The plaintiff having availed itself of neither method to perfect its appeal, it results that the appeal cannot be considered and that we must affirm the order. (*Knox v. Schrag*, ante, p. 220, [122 Pac. 969]; *Harrison v. Cousins*, 16 Cal. App. 515, [117 Pac. 564]; *Hibernia Sav. & Loan Society v. Doran*, 161 Cal. 118, [118 Pac. 526]; *Hershey v. Bristol*, 162 Cal. 110, [121 Pac. 371].)

The order is affirmed.

Hall, J., and Lennon, P. J., concurred.

[Civ. No. 927. First Appellate District.—March 8, 1912.]

**T. C. TOGNAZZINI, Appellant, v. ISAAC FREEMAN and
ROSE FREEMAN, Respondents.**

ACTION FOR DAMAGES—COLLISION OF AUTOMOBILES—COMPLAINT FOR INTENTIONAL AND WILLFUL ACT—PREJUDICIAL INSTRUCTION—BURDEN OF PROVING NEGLIGENCE.—In an action for damages for a collision between plaintiff's and defendants' automobiles, where the complaint of the plaintiff alleged only that the defendants intentionally and willfully ran their automobile upon and against the automobile of the plaintiff, to his alleged damage, and contained no averment as to any act of negligence of the defendants, it was prejudicial error to instruct the jury that the plaintiff's cause of action is based upon the carelessness and negligence of the defendants and that the burden is upon the plaintiff to prove that the alleged damages to his automobile were solely caused by the carelessness and negligence of the defendants.

ID.—PROOF OF NEGLIGENCE NOT AUTHORIZING RECOVERY—FATAL VARIANCE.—Under the facts stated in the complaint, no recovery could be had for mere negligence; and if the evidence offered upon the trial in support of the plaintiff's case should show negligence only, there would be a fatal variance between the material allegations of the complaint and the proof.

ID.—RIGHT OF PLAINTIFF TO INSTRUCTION UPON THEORY OF COMPLAINT. The complaint in every action should be founded upon a theory, and the plaintiff is entitled to have the jury instructed by the trial court upon the law applicable to the theory upon which the cause of action is founded.

ID.—ERRONEOUS INSTRUCTION NOT CURED BY CORRECT INSTRUCTION—IRRECONCILABLE CONFLICT.—The erroneous instruction is not cured by a correct instruction that a person committing a willful, wrongful act must respond in damages, and that if the jury found from the evidence that the defendants willfully and deliberately caused the collision in question, their verdict must be for plaintiff. There is such an irreconcilable conflict between this instruction and the one limiting the cause of action to negligence, that it is impossible to determine which of the two conflicting theories was followed by the jury; and the erroneous instruction must be deemed prejudicial, notwithstanding the correct conflicting instruction.

ID.—DISTINCTION BETWEEN "NEGLIGENCE" AND "WILLFULNESS."—Ordinarily, and likewise in the law, as sustained by the great weight of authority, there is a decided and well-defined distinction between mere "negligence" and "willfulness." Negligence is opposed to diligence and signifies the absence of care. It is negative in its nature, implying a failure of duty. The moment a person wills to do an injury, he ceases to be negligent.

ID.—CONTENTION THAT CASE WAS TRIED ON THEORY OF NEGLIGENCE ALONE NOT SUSTAINED BY RECORD.—It is held that the contention that both parties tried the case on the theory of negligence alone is not sustained by the record, but that, on the contrary, the record shows that the instructions requested by the plaintiff were expressly framed on the theory that the negligence of the defendants in permitting their automobile to run away was not of itself sufficient to warrant a verdict for plaintiff, and that it could not be rightfully rendered unless it was first found from the evidence that defendants willfully and deliberately caused the collision.

ID.—BILL OF EXCEPTIONS NOT SUSTAINING INEVITABLE ACCIDENT—SHOWING AS TO PROOF.—It is held that the bill of exceptions does not sustain the contention that the verdict was based on the theory of inevitable accident because of an instruction on that theory. Where the verdict was general both against the plaintiffs on their cause of action and against the defendants on their cross-complaint, on each of which the evidence was conflicting, and the bill of exceptions

evidence that the alleged injuries to plaintiff's automobile were solely caused by the carelessness and negligence of the defendants the plaintiff cannot recover, and it is your duty to find a verdict in favor of the defendants."

The vice of this instruction is that it assumes that plaintiff's pleaded cause of action was for damages caused solely by the carelessness and negligence of the defendants; whereas it is readily apparent from the first reading of the plaintiff's complaint that the defendants' alleged negligence in the first instance, although it resulted in their losing control of the speed of their automobile, was not claimed by the plaintiff to be the cause, proximate or otherwise, of the collision. Plainly the plaintiff's cause of action was stated and founded solely upon a willful and deliberate wrongful act of the defendants. By no process of reasoning is the complaint susceptible of the construction that the plaintiff was seeking to recover upon the theory that the damage alleged resulted either immediately or at all from the negligence of the defendants in losing control of the speed of their automobile. It is equally clear from a reading of the complaint that under the circumstances therein narrated this negligence in and of itself would not have resulted in any damage to the plaintiff; and it follows that if the plaintiff was entitled to recover at all, it must have been upon the theory, supported by proof, that the damage complained of was the proximate result of the willful and deliberate act of the defendants, which, although exerted in an effort to save themselves from disaster, was nevertheless wrongful and actionable.

In brief, under the facts stated in the plaintiff's complaint, no recovery could have been had for mere negligence; and if the evidence offered upon the trial in support of plaintiff's case showed negligence only, there would have been a fatal variance between the material allegations of plaintiff's complaint and the proof. (*Louisville & Nashville R. R. Co. v. Johnston*, 79 Ala. 436; *Birmingham etc. R. R. Co. v. Jacobs*, 92 Ala. 187, [12 L. R. A. 830, 9 South. 320]; *South & North Ala. R. R. Co. v. Schaufler*, 75 Ala. 136; *Highland Ave. etc. R. R. Co. v. Winn*, 93 Ala. 306, [9 South. 509]; 1 *Shearman & Redfield on Negligence*, sec. 7, p. 6.)

The complaint in every action should be founded upon a theory, and the plaintiff is entitled to have the jury instructed

by the trial court upon the law applicable to the theory upon which the cause of action is founded. (*Buena Vista etc. Co. v. Tuohy*, 107 Cal. 243, [40 Pac. 386]; *Renton Holmes Co. v. Monnier*, 77 Cal. 449, [19 Pac. 820]; *Buckley v. Silverberg*, 113 Cal. 673, [45 Pac. 804].)

There is no escape from the conclusion that the trial court in the instruction complained of not only ignored the real theory of plaintiff's complaint, but erroneously limited the jury in its deliberations to the determination of a single question of fact which, under the pleadings, was not a material issue in the case, and which, if it had been submitted to the jury in the form of a special issue, would not have supported a verdict for or against the plaintiff.

It cannot be said that the error of this instruction was rendered harmless by anything which the court may have said elsewhere in its charge to the jury. True, the court in a preceding instruction did tell the jury that a person committing a willful, wrongful act must respond in damages; and that if they found from the evidence that the defendants willfully and deliberately caused the collision in question the verdict must be for plaintiff. This theory of the case, however, was so absolutely opposed to the subsequent instruction, which limited the plaintiff's cause of action solely to the defendants' negligence, as to make it impossible for us to determine which of the two conflicting theories was followed by the jury, and therefore the erroneous instruction must be deemed to have been prejudicial. (*Lemasters v. Southern Pacific Co.*, 131 Cal. 105, [63 Pac. 128]; *Rathbun v. White*, 157 Cal. 248, [107 Pac. 309].)

The evident conflict in the trial court's presentation of the vital issue in the case to the jury cannot be reconciled, or the charge of the court as a whole harmonized, upon the theory that the term "negligence," as used by the court in the instruction complained of, was broad enough in its legal signification to cover both the careless and the willful acts of the defendants. Ordinarily, and likewise in the law, there is a decided and well-defined distinction between mere "negligence" and "willfulness." Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong, and it follows that the moment a person

wills to do an injury he ceases to be negligent. (*Stephenson v. Southern Pacific Co.*, 102 Cal. 143, [34 Pac. 618, 36 Pac. 407]; *Smith v. Whittier*, 95 Cal. 279, [30 Pac. 529]; Beach on Contributory Negligence, sec. 62; *Gardner v. Heartt*, 3 Denio (N. Y.), 232; *Cleveland C. E. & L. Ry. Co. v. Taritt*, 64 Fed. 823, [12 C. C. A. 618]; *Raming v. Metropolitan St. Ry. Co.*, 157 Mo. 477, [57 S. W. 268]; *Holwerson v. St. Louis etc. Co.*, 157 Mo. 216, [50 L. R. A. 850, 57 S. W. 774]; *Linton Coal M. Co. v. Persons*, 15 Ind. App. 69, [43 N. E. 651]; *Dull v. Cleveland*, 21 Ind. App. 571, [52 N. E. 1013]; *Brooks v. Pittsburg*, 158 Ind. 62, [62 N. E. 694].)

Notwithstanding the confused and indiscriminate use at times of the terms "negligence" and "willfulness" by judges and text-writers, it is certain that the weight of authority supports the view that those terms have a distinct and well-defined meaning, which is clearly pointed out in *Holwerson v. St. Louis etc. Co.*, 157 Mo. 216, [50 L. R. A. 850, 57 S. W. 774], where it is said: "By 'negligence' is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. . . . By 'willful negligence' is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term 'willful negligence,' if these words are to be interpreted with scientific accuracy, is a misnomer."

The defendants in a measure confess the conflict between the pleadings and the instruction complained of; but endeavor to justify it upon the ground that the cause was tried by the lower court, with the acquiescence and approval of the parties to the action, upon the theory that the liability of the defendants, if any, was for damages arising from the negligence rather than the willful act of the defendants. In other words, it is the claim of the defendants that the cause was tried as if the plaintiff's complaint and the defendants' answer had specifically put in issue the defendants' negligence

to the exclusion of the claim that the collision resulted from the deliberate and wrongful act of the defendants. If this were so the plaintiff would not now be heard to complain for the first time that the negligence of the defendants in the first place, and without regard to their alleged subsequent willful and wrongful act, was not an issue in the case; but the record before us fails to show affirmatively or by fair inference that the cause was tried in the court below upon any issue other than that originally framed by the pleadings in the case. Nothing that is contained in plaintiff's requested instructions warrants the claim of defendants' counsel that the case was tried solely upon the theory that the defendants were guilty of negligence and not guilty of a willful and deliberate act. On the contrary, the record shows that the instructions requested by plaintiff were expressly framed upon the theory that the negligence of the defendants in permitting their automobile to run away was not in and of itself sufficient to warrant a verdict for plaintiff, and that a verdict for plaintiff could not have been rightfully rendered unless it was first found from the evidence that the defendants willfully and deliberately caused the collision.

During the course of its charge to the jury the trial court made use of this language: "As counsel have informed you, the plaintiff claims damages because he alleges that he was negligently run into by the defendants." This language, it is claimed, verifies defendants' contention that the action was tried and determined solely upon the supposed issue of negligence. It will be observed, however, that it does not appear from the quoted statement of the trial court which of the counsel was referred to; but in any event for us to hold that a mere general statement of the trial court in its charge to the jury, over which counsel for either party had no control, is conclusive or any evidence of the fact that counsel for plaintiff waived the issues raised by the pleadings, and consented that the case be tried upon a wholly different theory, would be carrying the "theory of the case" doctrine to greater lengths than the ends of justice require or permit. If, in fact, the case had been by acquiescence of the court and the parties to the action tried upon an issue which was foreign to the pleadings, that fact could easily have been shown by a direct statement in the bill of exceptions, or by a transcription of

the record of the proceedings had upon the trial, from which the theory upon which the case was tried might be shown or fairly inferred.

The defendants further contend that because the jury were instructed upon the law of inevitable accident, it must be assumed that they heeded such instruction, and based their verdict upon the finding that the collision was the result of inevitable accident.

This contention is untenable. The bill of exceptions certifies to the fact that the evidence upon the whole case was sufficient to sustain the allegations of the pleadings of the respective parties. Presumably in that situation the evidence was conflicting, and as the verdict was general in its nature, it is impossible for us, in the face of conflicting evidence and contradictory instructions, to determine upon which of the several phases of the case the verdict was founded.

In view of what has been said, it will not be necessary for us to follow counsel in their discussion of the trial court's charge upon the law of contributory negligence further than to say that the plaintiff's cause of action having been stated solely upon the willful, wrongful act of the defendants, the doctrine of contributory negligence has no application to any phase of the case; and the fact that the trial court deemed it necessary to charge at all upon that subject emphasizes the contention that the cause of action stated in the plaintiff's complaint was misunderstood and erroneously stated to the jury. (1 Thompson on Negligence, sec. 383; 1 Shearman & Redfield on Negligence, sec. 64; *Esrey v. Southern Pac. Co.*, 103 Cal. 541, [37 Pac. 500]; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, [98 Am. St. Rep. 85, 63 L. R. A. 238, 74 Pac. 15].)

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 947. First Appellate District.—March 8, 1912.]

E. MARTIN & COMPANY, a Corporation, Respondent, v. MARY BROSNAN, as Administratrix of the Estate of THOMAS BROSNAN, Deceased, Appellant.

ESTATES OF DECEASED PERSONS—ACTION ON REJECTED CLAIM—ADMINISTRATRIX AS WITNESS FOR PLAINTIFF—MOTION TO STRIKE OUT PROPERLY DENIED.—In an action on a rejected claim against the estate of a deceased person, where the administratrix of the estate was called as a witness for the plaintiff, was examined and cross-examined, without objection to her testimony as a whole, the defendant cannot be heard to complain, after the witness has left the stand, that her evidence was objectionable as a whole, and a motion then made to strike out all of her evidence, not based upon any valid objection previously stated, was properly denied.

ID.—CROSS-EXAMINATION OF PLAINTIFF'S WITNESS—QUESTION CALLING FOR INCOMPETENT HEARSAY—EXCLUSION BY COURT OF ITS OWN MOTION.—While, ordinarily, it is the better and safer practice for the trial court to defer action upon the admission or rejection of evidence until a proper objection is made by the party interested in having the evidence excluded, yet, where the defendant, on cross-examination of a witness for the plaintiff, asked a question clearly calling for incompetent hearsay, the trial court is not compelled to hear and determine the cause, either in whole or in part, upon improper evidence, and, in the exercise of its undoubted right to control the conduct of the trial, it may of its own motion rightfully refuse to receive such clearly incompetent evidence.

ID.—ADMISSION OF CLAIM AS EVIDENCE—SHOWING AGAINST BAR OF STATUTE NOT REQUIRED—WAIVER OF FORMAL DEFECTS.—The claim sued upon against the estate was properly admitted in evidence over the objection of the defendant. It was not necessary that such claim should show on its face that it is not barred by the statute of limitations; and in so far as the objection was directed to the formal sufficiency of the claim, its general rejection in the first instance, without special reason assigned, must be deemed a waiver of any formal defects therein.

ID.—ADMISSION IN ANSWER OF PRESENTATION AND REJECTION OF CLAIM—PROOF IN SUPPORT OF ACTION.—Where the answer affirmatively admitted the presentation and rejection of the claim, no evidence thereof is required, but it is sufficient for the plaintiff to show that the action thereon is founded upon the same claim which was presented to the defendant for allowance.

ID.—PROMISE OF ADMINISTRATRIX TO PAY DEBT OF DECEASED HUSBAND TO PLAINTIFF—CREDITS ON ACCOUNT—NOVATION NOT ESTABLISHED—

INTENT.—A promise by the administratrix of the estate of her deceased husband, to pay the indebtedness of her husband to the plaintiff, and the making of some payments to the plaintiff, which were credited on the indebtedness of the deceased husband to the plaintiff, does not establish a novation, or release the liability of the estate to pay the unpaid residue of the plaintiff's claim. The intent to release the original debtor from the whole of the claim is essential to a novation, and if that intent be lacking, novation cannot be justly claimed.

ID.—INADVERTENT REMARK OF COURT IN DENYING NONSUIT—ABSENCE OF "NOVATION"—QUESTION OF FACT—PROVINCE OF JURY—CORRECTION—PRESUMPTION.—Where the court, in denying a motion of defendant to nonsuit the plaintiff, inadvertently referred to a certain feature of the case, "which would indicate that there was no novation," and upon defendant's objection that the "province of the jury was invaded," the court promptly withdrew the remark, and instructed the jury immediately not to consider any remarks made by the court in passing upon the motion for a nonsuit, it is to be presumed that the jury heeded the caution, and the remark cannot be assigned upon appeal as prejudicial error.

ID.—EVIDENCE FOR PLAINTIFF SUFFICIENT TO SUPPORT VERDICT—ABSENCE OF COUNTER-EVIDENCE—NONSUIT PROPERLY DENIED.—It is held that the evidence for the plaintiff is amply sufficient to support the verdict, and that, as there was no counter-evidence for the defendant, a motion for a nonsuit of the plaintiff was properly denied.

ID.—ABSENCE OF PREJUDICIAL ERROR IN INSTRUCTIONS.—It is held that there was no prejudicial error of the court in giving or refusing instructions requested; and that in so far as the requested instructions were correct, they were in substance incorporated into and made part of the charge of the court, which was all that the defendant was entitled to.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

F. J. Castelhun, for Appellant.

Rothchild, Golden & Rothchild, for Respondent.

LENNON, P. J.—This action was brought to recover the sum of \$908 upon a claim against the estate of Thomas Brosnan, deceased, for merchandise sold to him during his lifetime

by plaintiff. The trial was had with a jury, and resulted in a verdict and judgment for the plaintiff in the sum of \$618. From the judgment and an order denying a new trial an appeal has been taken upon the judgment-roll and a bill of exceptions.

It was not error for the trial court to refuse to strike out all of the testimony of the defendant, Mary Brosnan, who was called as a witness for the plaintiff. The motion to strike out was not made until the witness had concluded her testimony and left the witness-stand. Ample opportunity was afforded counsel for the defendant, during the course of an extended direct and cross-examination of this witness, to object to her testimony had he so desired, but he failed to avail himself of the opportunity. He will not now be heard to complain that the testimony of the witness was objectionable; and as a motion to strike out evidence must be based upon a valid objection previously stated, the motion in the present case was properly denied. (*People v. Long*, 43 Cal. 444; *People v. Rolfe*, 61 Cal. 542; *People v. Samario*, 84 Cal. 484, [24 Pac. 283]; *In re Wax*, 106 Cal. 347, [39 Pac. 624].)

The trial court of its own motion refused to permit a witness for the plaintiff to reply to a question upon cross-examination which plainly called for hearsay testimony. The point is now made that in the absence of an objection from plaintiff's counsel it was error to exclude the answer. Ordinarily, it is the better and safer practice for the trial court to defer action upon the admission or rejection of evidence until a proper objection is made by the party interested in having the evidence excluded; but the trial court nevertheless is not compelled to hear and determine a cause, either in whole or in part, upon improper evidence; and in the exercise of its undoubted right to control and regulate the conduct of the trial, it may of its own motion rightfully refuse to receive evidence which is palpably incompetent. (*Parker v. Smith*, 4 Cal. 105; *People v. Wallace*, 89 Cal. 158, [26 Pac. 650]; *Davey v. Southern Pac. Co.*, 116 Cal. 325, [48 Pac. 117].)

There was no error in admitting in evidence, over the objection of the defendant, the plaintiff's claim against the estate of the decedent. It was not necessary that the claim should show upon its face that it was not barred by the statute of limitations; and in so far as the objection was directed to the formal sufficiency of the claim it will suffice to say that, inas-

much as the claim in the first instance was rejected generally and not for any special reason, its formal defects, if any, must be deemed to have been waived. (*Wise v. Hogan*, 77 Cal. 184, [19 Pac. 278]; *Aiken v. Coolidge*, 12 Or. 244, [6 Pac. 713].)

Moreover, as the presentation and rejection of the claim were affirmatively admitted by the defendant's answer, evidence thereof was not required; and it was sufficient for the plaintiff to show that the action was founded upon the same claim which was presented to the defendant for allowance. (*McGowan v. McDonald*, 111 Cal. 57, [52 Am. St. Rep. 149, 43 Pac. 418]; 1 Ross' Probate Law, 534.)

It is the contention of the defendant that the verdict of the jury is not only not justified by the evidence, but that it is contrary thereto. This contention is based upon the claim that the evidence shows that the defendant, pursuant to an agreement with the plaintiff, assumed the indebtedness of her husband, and that she thereafter made payments to the plaintiff which were applied on said indebtedness. From this it is argued that the defendant was substituted in the place and stead of the original debtor with the intent of releasing the latter, and that thereby a contract of novation was created.

Assuming that the evidence shows all that the defendant claims in this behalf, still it does not follow as a matter of law that the acts and agreements of the parties amounted to a novation as defined by subdivision 2 of section 1531 of the Civil Code. It may be conceded that the evidence does show that the defendant promised to pay the debt of her deceased husband, and that certain payments which she made were applied by plaintiff to that indebtedness; but it must also be conceded that the evidence fails to show that the plaintiff, in consideration thereof, agreed or intended to release the estate of the decedent. The intent of the creditor to release the obligation of the original debtor is necessary to the creation of a contract of novation; and if it be lacking, as it apparently was in the present case, novation cannot be justly claimed. (Civ. Code, sec. 1531, subd. 2; *Pimental v. Marques*, 109 Cal. 406, [42 Pac. 159]; *Dellapiazza v. Foley*, 112 Cal. 380, [44 Pac. 727]; *Carpv v. Dowdell*, 131 Cal. 495, [63 Pac. 778].)

In our opinion the evidence sufficiently supports the verdict, and this conclusion necessarily disposes of the defendant's further contention that the trial court erred in denying her motion for nonsuit. Obviously, if the evidence was sufficient

to warrant the verdict for the plaintiff it would have been error to grant a nonsuit.

Upon the motion for a nonsuit being denied the defendant rested, and the case went to the jury solely upon the testimony offered and received upon the behalf of the plaintiff. Immediately following the denial of the defendant's motion for a nonsuit the trial court expressly stated to the jury that the ruling on that motion was not to be considered as an expression of opinion by the court as to the facts of the case. In addition, however, and no doubt inadvertently, the trial court did say during the course of its remarks to the jury that a certain feature of the case "would indicate that there was no novation." Clearly this was expressing the opinion of the court as to the effect of the evidence; and if it had been permitted to stand without correction there would have been no escape from the conclusion that it was tantamount to an instruction upon a question of fact. Counsel for the defendant, however, obviated this error by calling attention to the fact that the province of the jury had been invaded; whereupon the court promptly withdrew this statement, and clearly cautioned the jury not to be influenced in their deliberations by anything that the court might have said with reference to the denial of the motion for nonsuit.

Presumably the jury heeded the caution, and consequently the incident cannot now be successfully assigned as prejudicial error.

It is claimed, however, that the trial court repeated the error of charging upon matters of fact in a subsequent instruction. That instruction in effect told the jury that if they found for the plaintiff the verdict might be for the sum sued for or any less sum justified by the evidence; and while the language employed was ambiguous and barely expressed the idea which the court endeavored to convey to the jury, nevertheless a liberal interpretation of the instruction does not compel the conclusion that the trial court expressed its opinion unequivocally or at all as to the weight and effect of the evidence.

It was not disputed that the deceased at the time of his death was justly indebted to the plaintiff, and it was not claimed that the indebtedness had ever been fully paid. Under the defendant's theory of the case, novation and the application of payments were apparently the chief matters in

much as the claim in the first instance was rejected generally and not for any special reason, its formal defects, if any, must be deemed to have been waived. (*Wiss v. Hogan*, 77 Cal. 184, [19 Pac. 278]; *Aiken v. Coolidge*, 12 Or. 244, [6 Pac. 713].)

Moreover, as the presentation and rejection of the claim were affirmatively admitted by the defendant's answer, evidence thereof was not required; and it was sufficient for the plaintiff to show that the action was founded upon the same claim which was presented to the defendant for allowance. (*McGowan v. McDonald*, 111 Cal. 57, [52 Am. St. Rep. 149, 43 Pac. 418]; 1 Ross' Probate Law, 534.)

It is the contention of the defendant that the verdict of the jury is not only not justified by the evidence, but that it is contrary thereto. This contention is based upon the claim that the evidence shows that the defendant, pursuant to an agreement with the plaintiff, assumed the indebtedness of her husband, and that she thereafter made payments to the plaintiff which were applied on said indebtedness. From this it is argued that the defendant was substituted in the place and stead of the original debtor with the intent of releasing the latter, and that thereby a contract of novation was created.

Assuming that the evidence shows all that the defendant claims in this behalf, still it does not follow as a matter of law that the acts and agreements of the parties amounted to a novation as defined by subdivision 2 of section 1531 of the Civil Code. It may be conceded that the evidence does show that the defendant promised to pay the debt of her deceased husband, and that certain payments which she made were applied by plaintiff to that indebtedness; but it must also be conceded that the evidence fails to show that the plaintiff, in consideration thereof, agreed or intended to release the estate of the decedent. The intent of the creditor to release the obligation of the original debtor is necessary to the creation of a contract of novation; and if it be lacking, as it apparently was in the present case, novation cannot be justly claimed. (Civ. Code, sec. 1531, subd. 2; *Pimental v. Marques*, 109 Cal. 406, [42 Pac. 159]; *Dellapiazza v. Foley*, 112 Cal. 380, [44 Pac. 727]; *Carpy v. Dowdell*, 131 Cal. 495, [63 Pac. 778].)

In our opinion the evidence sufficiently supports the verdict, and this conclusion necessarily disposes of the defendant's further contention that the trial court erred in denying her motion for nonsuit. Obviously, if the evidence was sufficient

to warrant the verdict for the plaintiff it would have been error to grant a nonsuit.

Upon the motion for a nonsuit being denied the defendant rested, and the case went to the jury solely upon the testimony offered and received upon the behalf of the plaintiff. Immediately following the denial of the defendant's motion for a nonsuit the trial court expressly stated to the jury that the ruling on that motion was not to be considered as an expression of opinion by the court as to the facts of the case. In addition, however, and no doubt inadvertently, the trial court did say during the course of its remarks to the jury that a certain feature of the case "would indicate that there was no novation." Clearly this was expressing the opinion of the court as to the effect of the evidence; and if it had been permitted to stand without correction there would have been no escape from the conclusion that it was tantamount to an instruction upon a question of fact. Counsel for the defendant, however, obviated this error by calling attention to the fact that the province of the jury had been invaded; whereupon the court promptly withdrew this statement, and clearly cautioned the jury not to be influenced in their deliberations by anything that the court might have said with reference to the denial of the motion for nonsuit.

Presumably the jury heeded the caution, and consequently the incident cannot now be successfully assigned as prejudicial error.

It is claimed, however, that the trial court repeated the error of charging upon matters of fact in a subsequent instruction. That instruction in effect told the jury that if they found for the plaintiff the verdict might be for the sum sued for or any less sum justified by the evidence; and while the language employed was ambiguous and barely expressed the idea which the court endeavored to convey to the jury, nevertheless a liberal interpretation of the instruction does not compel the conclusion that the trial court expressed its opinion unequivocally or at all as to the weight and effect of the evidence.

It was not disputed that the deceased at the time of his death was justly indebted to the plaintiff, and it was not claimed that the indebtedness had ever been fully paid. Under the defendant's theory of the case, novation and the application of payments were apparently the chief matters in

dispute, and the court was requested to charge the jury upon the law relating to these subjects. The refusal of the court, however, to charge the jury in the exact language of the requested instructions was without prejudice to the defendant. While the court in its charge did not elaborate certain points of the case as fully as the defendant desired, still as a whole it fairly covered every phase of the case embodied in the requested instructions, and conformed generally to the theory upon which the defendant based her defense to the action. In so far as the requested instructions were correct in their statement of the law of the case they were in substance incorporated in and made a part of the charge of the court, and that was all that the defendant was entitled to.

The remaining points presented in support of the appeal do not merit discussion, and it will suffice to say that we are satisfied from a perusal of the entire record that the trial of the cause was free from prejudicial error, and resulted in a judgment supported by the evidence which does substantial justice to the parties.

The judgment and order appealed from are affirmed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 882. Third Appellate District.—March 8, 1912.]

GEORGE McCOWEN et al., Respondents, v. J. W. PEW,
Appellant.

SPECIFIC PERFORMANCE—CONTRACT TO SELL TIMBER LAND—DEDUCTION FOR TIMBER CUT—DISCRETION AS TO INTEREST—CONSTRUCTION OF CODE.—In an action of specific performance of a contract to sell timber land, where an allowance was made for the deduction of the value of timber cut, the court had discretion to allow interest on the residue of the price of the timber land from the date when the vendors were in condition to make a good title until paid, whether the action be deemed one on express contract for the residue of the price, under section 3287 of the Civil Code, or one on an implied contract, upon *quantum meruit*, under section 1917 of the same code.

ID.—EQUITABLE CIRCUMSTANCES IN FAVOR OF INTEREST—REJECTION OF REASONABLE OFFER—UNREASONABLE DEMAND—EXPENSIVE LITIGATION.—Where there was a dispute as to value of the timber cut, and

pending negotiations between the parties, the vendors finally offered a deduction of \$600, which offer was refused, and the court on the basis of the acreage cut at the agreed price per acre allowed only \$410 therefor, and the unreasonable deduction of over \$4,000 was demanded by plaintiff, and such unreasonable demand led to a long and expensive litigation, the case is clearly one for the application of the equitable principle of interest for long delay in breach of the obligation to pay the residue of the agreed price.

1D.—STATUTORY INTEREST ALLOWABLE — AMOUNT “CAPABLE OF CERTAINTY BY CALCULATION.”—It is held that, aside from the strictly equitable view as to interest, the facts of the case justify the application of section 3287 of the Civil Code, which allows interest not only when the damages are certain, but also when they are “capable of being made certain by calculation.” Since appellant knew the number of acres from which the timber had been removed, and the whole land was principally valuable for its timber, and the agreed price therefor was fifteen dollars per acre, it would seem to be a mere “matter of calculation” to determine what allowance should be made for said removal.

1D.—EXISTENCE OF UNLIQUIDATED SETOFF OR COUNTERCLAIM TO LIQUIDATE DEMAND — INTEREST ON BALANCE ALLOWED.—Where the amount of a demand is sufficiently certain to justify the allowance of interest thereon, the existence of a setoff or counterclaim, which is itself unliquidated, will not prevent the recovery of interest on the balance of the demand from the time it became due.

APPEAL from a part of the judgment of the Superior Court of Mendocino County awarding interest to respondents. J. Q. White, Judge.

The facts are stated in the opinion of the court and the decision therein referred to.

Jesse W. Lilienthal, and James E. Pemberton, for Appellant.

H. C. McPike, and Robert Duncan, for Respondents.

BURNETT, J.—A full recital of the facts involved in this litigation may be found in *McCowen v. Pew*, 147 Cal. 299, [81 Pac. 958], and in the decision rendered in this court on the twenty-first day of February, 1912, and reported *ante*, p. 302, [123 Pac. 19]. This is an appeal by defendant from that portion of the judgment “which directs and requires of said defendant the payment of any interest on any sum

of money required by said judgment to be paid by him to the said plaintiffs as a condition of the conveyance to him by the said plaintiffs" of the real property in controversy. Defendant was required to pay fifteen dollars per acre for the land, "less the sum of \$410 deducted on account of the cutting of said timber, within thirty days from the rendition of judgment herein together with interest thereon at the rate of seven per cent per annum, simple interest, from the 6th day of December, 1900, to the date of said payment, or tender thereof." It may be stated that the sixth day of December, 1900, was the date on and after which "plaintiffs were able to give good title." It is admitted by appellant that we have no decision in this state directly in point, but it is contended that "the California cases go to the extent of deciding that, where there is a *quantum meruit* or a *quantum valebat* to be proved in order to establish the amount recoverable, no interest can be recovered in California until the amount is settled and fixed by the judgment of the court. Here the amount due under the original contract was fixed by the contract, but the amount to be paid must be calculated on the principle of a *quantum meruit*. In the calculation of that there was sharp difference of opinion between the parties and also their respective counsel. That the position taken by us was finally declared to be incorrect by the supreme court we must admit, but it was taken by defendant on the advice of counsel and in good faith, and all the time he was offering to pay whatever the court said he should pay." We need not discuss the difference as to interest between an express and an implied contract. The subject is fully considered and the authorities reviewed by this court in *Courtney v. Standard Box Co.*, 16 Cal. App. 600, [117 Pac. 778]. Generally speaking, it may be said, the former comes under the provisions of section 3287 and the latter of section 1917 of the Civil Code. But we do not think either section was intended to take away all discretion, as to interest, in a case like this. This was an action in equity to quiet title on the part of plaintiff with a cross-complaint by defendant demanding specific performance of a contract to convey. The court found that the contract should be performed, and, under the general principles of equity which it was at liberty to apply, the court had discretion to impose such terms as seemed just and reasonable, subject, of course,

to review for any abuse of discretion. In equitable actions, it is true, the rule of law as to interest is generally followed: "but interest is sometimes allowed by courts of equity in the exercise of a sound discretion, when it would not be recoverable at law. On the other hand courts of law are sometimes affected by equitable considerations in the allowance of interest." (22 Cyc. 1475.) Respondents put the question as follows: "Is it conceivable that equity demands that for the last twelve years these plaintiffs shall have borne the taxes upon that land, the insurance, the care of it, preserved it to this day, when it is worth ten times what it was then, and it is to be wrenched from them at one-tenth its present value, but that even they are to be deprived of the poor modicum of compensation which has remained in the pockets of this defendant who has never spent a cent?"

But it is clear that the important question with us is whether the court had any discretion at all in the matter of interest. As far as equitable considerations are concerned, we must assume, on this appeal, that the judgment is altogether just. The appeal being on the judgment-roll, we may accept as established any fact, not inconsistent with the findings, that may have influenced the lower court in awarding interest.

For instance, we may take for granted the following circumstances, which are disclosed in the transcript before us: On October 11, 1900, appellant gave written notice of his election to exercise his option and he offered to pay for the property as he had agreed, less the loss occasioned by the said destruction of timber caused by respondents. The latter promptly replied that they were willing to make a liberal concession, trusting that appellant "will not be extortionate." They asked for the figures that appellant thought he should pay. Later they gave notice of having deposited a deed of the premises to appellant subject to his acceptance for the agreed price with an allowance of \$300 for twenty acres cut over. Afterward they sent a communication to appellant in which they stated that all of his objections to and criticism of the title had been obviated, and that the "trifling loss in value of the said real property occasioned by the removal or destruction or injury to timber upon part thereof can readily be made certain by computation. We have carefully calculated such loss and find the same to amount to less

than the sum of four hundred dollars. For the sake of doing full justice and making adequate compensation to you in the premises, we have made an allowance of four hundred dollars on the contract price payable for said real property as aforesaid." Subsequently they offered to allow \$600, but appellant insisted that it should be over \$4,000, estimating it upon a basis entirely untenable, as held by the supreme court in said decision in the 147th California Report. The unreasonable demand of appellant, therefore, led to the long delay and expensive litigation in the cause. As a condition precedent to his payment for the property he required a reduction from the contract price of ten times as much as he was entitled to. Hence it is clearly a case for the application of the principle of moratory interest. It is allowable *ex aequo et bono*, as held by authorities of the highest character. It is said by the supreme court of the United States, in *Curtis v. Innerarity*, 6 How. (U. S.) 146, [12 L. Ed. 380], that "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from the breach. Hence every nation, whether governed by the civil or common law, has established a common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Everyone who contracts to pay money on a certain day knows that if he fails to fulfill his contract he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties." Here, as we have seen, it was the fault of appellant that the sale was not consummated years ago, and it is only just that he should repair the damage that has followed from the breach of his obligation.

But outside of the strictly equitable view, the foregoing suggests the application to the situation of said section 3287 of the Civil Code. Said section allows interest, as we have seen, when the damages are certain and also when they are "capable of being made certain by calculation." Appellant was informed of the number of acres from which the timber has been removed, the land was valuable principally for the timber, the agreed price was fifteen dollars an acre, and it would seem to be a mere matter of calculation to determine

what allowance should be made for said removal. (*Robinson v. American Fish & Oyster Co.*, 17 Cal. App. 212, [119 Pac. 388].)

There is another view, also taken by respectable authority, which would lead to an affirmance of the judgment. It is expressed in 22 Cyc., page 1514, as follows: "Where the amount of the demand is sufficiently certain to justify the allowance of interest thereon, the existence of a setoff or counterclaim which is itself unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due."

In *Healy v. Fallon*, 69 Conn. 228, [37 Atl. 495], the supreme court of Connecticut held that "In an action for the price under a building contract, plaintiff may be allowed interest as damages for the detention of the amount found to be due him, though such price was subject to unliquidated deductions for plaintiff's deviations from the contract." The court stated that "The claim was wholly a pecuniary one, and was not at large, as are claims for damages for assault and battery, slander, or others of like nature. It represented a loss of a pecuniary value ascertainable with reasonable certainty, as of a definite time; and we think damages in the shape of interest should be recoverable from that time, for such a loss, for only in this way can equity be done between the parties in the case at bar."

In *Tappan and Noble v. Harwood*, 2 Speers, 551, the supreme court of South Carolina said: "By the decisions of this state, wherever a party stipulates in writing to pay money on a certain day, or on the performance of any stipulation or contract, interest is allowed. On the admitted completion and receipt of the buildings, interest would have been unquestionably allowable from the time of completion. The discount claimed by the defendant (for defective workmanship) may reduce the amount covenanted to be paid, but does not impair the claim for interest on the balance, when adjusted by the verdict of the jury."

In *Smith v. Turner*, 33 Or. 379, [54 Pac. 166], the supreme court of Oregon held that a counterclaim for unliquidated damages in an action on a note does not cut off the recovery of interest on the note from the time the claim accrued, the court stating, through Mr. Justice Wolverton, that "The plaintiff's claim bears interest because there is a contract to

pay it, while, under the rule announced, the defendant's counterclaims do not, but it is attempted to counterclaim as respects the first separate defense as of the date when it is alleged the damages accrued, and thereby cut off the running of interest upon the note. This cannot be done, however, because it required the verdict of the jury, or at least the confession or default of the plaintiff, to liquidate the defendants' demand for their alleged damages arising by reason of plaintiff's supposed breach of contract, while the note draws interest by force of its direct stipulations." Other cases holding similarly are *Howard v. Behn*, 27 Ga. 174; *Stephens v. Burgess*, 69 Mo. 168; *Greenly v. Hopkins*, 10 Wend. (N. Y.) 96; *Watkins v. Junker*, 90 Tex. 584, [40 S. W. 11]. Two or three decisions are cited by appellant apparently holding to the contrary, but the weight of authority seems to be against him. But whatever rule may be adopted in this state, in the case at bar, considering the trifling amount of the setoff in comparison with what was due under the contract, it is reasonable and just to hold that the balance should bear interest from the time it was due. In fine, under the circumstances, we think it would be manifestly unjust and inequitable to deprive respondents of the interest, and the portion of the judgment appealed from is therefore affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 895. First Appellate District.—March 9, 1912.]

REDDING GOLD & COPPER MINING COMPANY, a Corporation, and THOMAS GILBERT, Appellants, v. NATIONAL SURETY COMPANY, a Corporation, Respondent.

JUDGMENT BY DEFAULT—RULE AS TO VACATION—DISCRETION—REVIEW UPON APPEAL—QUESTION OF ABUSE.—The matter of setting aside defaults and vacating judgments entered thereon is very largely a matter of discretion to be liberally exercised by the trial court in furtherance of justice, and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will only do so when it appears that there has been a plain abuse of discretion. Nevertheless, where the appellate court is obliged to say that

the action of the trial court involves an abuse of discretion, it is the duty of the appellate court to reverse the action of the trial court.

ID.—VACATING DEFAULT JUDGMENT UNDER SECTION 473—SHOWING REQUIRED.—Where a default and judgment have been regularly entered against a litigant, such default and judgment cannot be set aside and vacated except upon a showing, under section 473 of the Code of Civil Procedure, that they were taken against him through his mistake, inadvertence, surprise, or excusable neglect.

ID.—CONTRARY SHOWING—FAILURE TO ANSWER OR OBTAIN EXTENSION AFTER NOTICE OF DEMURRER OVERRULED—INEXCUSABLE NEGLIGENCE—ABSENCE OF SURPRISE.—Where there is nothing in the record to sustain the showing required, but it appearing that the defendant's attorney was served with a notice of the overruling of a demurrer to the complaint, he thereby had notice that the time within which the defendant could answer to the complaint was running against him, and in failing to take any action toward answering or getting more time to answer, the showing is one of inexcusable neglect. Neither could there be any surprise at the judgment taken against him, in any legal sense.

ID.—UNTENABLE DEMURRER—GROUND NOT APPEARING UPON FACE OF COMPLAINT.—It cannot be claimed that the demurrer to the complaint was tenable in support of the order vacating the default and judgment, where it purported to raise the point of the want of capacity of a foreign corporation to sue under the law of this state, which did not appear upon the face of the complaint. Such demurrer was without merit, and was properly overruled.

APPEAL from an order of the Superior Court of the City and County of San Francisco setting aside a default and judgment. Frank Murasky, Judge.

The facts are stated in the opinion of the court.

Henry H. Davis, for Appellants.

A. H. Jarman, Nat Schmulowitz, and Clarence Coonan, for Respondent.

HALL, J.—This is an appeal from an order setting aside a default and vacating the judgment entered against defendant upon such default.

The matter of setting aside defaults and vacating judgments entered thereon is very largely a matter of discretion, to be liberally exercised by the trial court in furtherance of justice, and where the action of the trial court will result in

a trial upon the merits the appellate courts are very reluctant to interfere with the exercise of such discretion, and will only do so when it clearly appears that there has been a plain abuse of discretion. (*O'Brien v. Leach*, 139 Cal. 220, [96 Am. St. Rep. 105, 72 Pac. 1004].)

Nevertheless cases do occur where the appellate court is obliged to say that the action of the trial court involves a plain abuse of discretion, and in such case it is the duty of the appellate court to reverse the action of the trial court. (*Shearman v. Jorgensen*, 106 Cal. 483, [39 Pac. 863]; *Bailey v. Taffe*, 29 Cal. 423; *People v. O'Connell*, 23 Cal. 282.)

We think the case at bar is such a case.

Plaintiffs commenced this action upon an injunction bond given by defendant as the surety thereon, in an action wherein one Rasmussen was plaintiff and plaintiffs herein were defendants.

A demurrer to the first complaint was sustained. Plaintiffs filed an amended complaint, to which defendant filed a demurrer. Subsequently defendant filed an amended demurrer. This demurrer came on regularly for hearing upon the fourth day of February, 1910, and no one appearing for defendant it was by the court overruled, and defendant allowed ten days to answer to the complaint. Written notice of the overruling of the demurrer and that defendant was allowed ten days to answer to the complaint was served upon the attorney for the defendant personally upon the fifth day of February, 1910, and his written admission of service indorsed on such notice. On the sixteenth day of February, 1910, the time allowed defendant to answer having expired, and no extensions of time having been granted either by the court or counsel, and no answer having been filed, the default of defendant was duly entered, and judgment entered against defendant as prayed for in said complaint.

Subsequently defendant upon affidavits procured an order from the court requiring plaintiffs to show cause why such default and judgment should not be set aside and vacated. A hearing was had upon this order, which resulted in the granting of the order appealed from.

Where, as in this case, a default and judgment have been duly and regularly entered against a litigant, such default and judgment cannot be set aside and vacated, except upon a showing that they were taken against him through his

mistake, inadvertence, surprise or excusable neglect. (Code Civ. Proc., sec. 473; *Shearman v. Jorgensen*, 106 Cal. 483, [39 Pac. 863]; *Bailey v. Taffe*, 29 Cal. 423; *People v. O'Connell*, 23 Cal. 282.) In the case at bar there is no dispute that the notice of the overruling of the demurrer and of the allowance to defendant of ten days to answer, was served upon the attorney for defendant personally upon the fifth day of February, 1910. Neither defendant nor his attorney took any action, either to answer or in any way to further defend against the complaint until after the judgment had been duly and regularly entered. There is neither in the affidavit filed by the attorney for defendant, nor elsewhere, any claim or pretense that anything was said or done at the time of the serving of the notice of the overruling of the demurrer or afterward to relieve such service from having its usual customary and legal effect. Neither is it pretended, either in the affidavit of said attorney or elsewhere, that anything whatever occurred after the serving of said notice which could or did prevent defendant from answering to the complaint. The bald facts are undisputed that such service was duly and regularly made upon the attorney for defendant, and that he took no further steps in relation to the action until after judgment had been duly and regularly entered against his client.

His affidavit does show that the hearing upon his demurrer had been continued several times, that upon several occasions the attorney for plaintiffs was not present at the calling of the demurrer, and that he, the affiant, had allowed the hearing to go over because of the absence of the attorney for plaintiffs, and that he had, prior to the overruling of his demurrer, extended other courtesies to the attorney for plaintiffs. And in his affidavit in support of the application for the order appealed from he states: "When deponent learned that plaintiffs claimed to have taken the default of the defendant, he was very much surprised, in the first place, because of deponent's liberal practice toward Mr. Davis [plaintiffs' attorney] in not having taken, or attempting to take, his, said Davis', default upon the numerous occasions hereinabove mentioned, when neither the said Davis nor any of his representatives had been in court," and also because a representative of the affiant had, at some time before the overruling of the demurrer stated to the attorney for plain-

tiffs that he considered the demurrer well taken. As a matter of law, the demurrer was not well taken. According to the affidavit of the attorney for plaintiffs, "the point of the amended demurrer is, that since the complaint does not contain any allegation of compliance by the plaintiff, a South Dakota corporation, with section 405 of the Civil Code, it has not the legal capacity to maintain this action under section 406 of the Civil Code." There was no merit at all in the demurrer. It does not appear upon the face of the complaint that said plaintiff had not complied with such section. The want of capacity to sue can only be raised by demurrer when such want of capacity appears upon the face of the complaint. (Code Civ. Proc., sec. 430; *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, [106 Am. St. Rep. 20, 79 Pac. 865].)

The cases referred to by the attorney for defendant (*Wood v. Ball*, 190 N. Y. 217, [83 N. E. 21], and *American De Forrest Wireless Tel. Co. v. Superior Court*, 153 Cal. 532, [96 Pac. 15]) give no support whatever to the claim of defendant's attorney as to the merits of his demurrer. The New York case, when read in its entirety, is distinctly against him, and the case in 153 Cal. is not in point as to the question presented by the demurrer.

The court, therefore, did not err in overruling defendant's demurrer, and the order vacating the judgment cannot be sustained upon any contention that might be made to the effect that the court erred in overruling such demurrer.

We are thus forced to look to the record to find facts sufficient to support a claim that the default and judgment were taken against defendant through his mistake, inadvertence, surprise or excusable neglect. We find nothing in the record to support any such claim. When the attorney for defendant was served with notice of the overruling of the demurrer he had notice that the time within which defendant could answer was running. The simple fact that he had been liberal and courteous in his treatment of counsel upon the other side did not justify him in ignoring the effect of the service of such notice. In failing to take any action toward either answering or getting more time to answer, he was guilty of inexcusable neglect.

Neither can he claim that the judgment was taken against his client through surprise in any legal sense. The very purpose of giving the notice of the overruling of the demurrer

and the allowance of time to answer was to put defendant upon notice that default might be entered upon expiration of the time allowed. Nothing was said or done to cause defendant or its attorney to believe that if no answer was filed judgment would not be taken in due course.

Quite as good, if not a better, showing for vacating a judgment entered upon a default was made both in *Shearman v. Jorgensen*, 106 Cal. 483, [39 Pac. 863], and in *Bailey v. Taffe*, 29 Cal. 423, and yet the supreme court was in each case constrained to hold that the trial court had erred in granting relief, and reversed the order. (See, also, *People v. O'Connell*, 23 Cal. 282.)

The order is reversed.

Kerrigan, J., and Lennon, P. J., concurred.

THE COURT.—As a matter of justice to the attorneys who represented the defendant and respondent before this court in the above-entitled matter, it is proper to say, as an addition to the facts stated in the opinion filed in said matter March 9, 1912, that said attorneys did not represent said defendant in the proceedings in the court below that resulted in the entry of default and judgment against said defendant.

[Civ. No. 892. First Appellate District.—March 11, 1912.]

W. BURKI, Appellant, v. **PLEASANTON SCHOOL DISTRICT OF ALAMEDA COUNTY**, a Municipal Corporation, etc., **W. H. COPE**, **F. M. DONOHUE**, and **L. C. WALTER**, Trustees of said School District, Respondents.

SCHOOL BUILDING—POWER OF BOARD OF TRUSTEES—CONDITIONS OF CONTRACT TO BUILD—ACCEPTANCE OF PLANS—APPROVAL OF BOND—CONSTRUCTION OF STATUTE.—It is held that under a fair construction of the act of 1872 (Stats. 1872, p. 925) providing for the erection of public school buildings, it empowers the board of trustees of a school district to accept the plans and specifications of an architect for a school building only upon the condition of the execution and approval of the required bond, and both the acceptance of the plans and specifications and the execution and approval of such bond are

essential conditions of a valid contract for the erection of such school building.

ID.—COMPLAINT OF ARCHITECT FOR DAMAGES FOR BREACH OF CONTRACT—CAUSE OF ACTION NONEXISTENT.—A complaint by the architect for damages for alleged breach of a contract to erect the public school building, which merely alleges that the plans and specifications submitted by him therefor were accepted by the board of trustees of the school district, and that he prepared and delivered a bond in the required sum, which shows that it was delivered long after its date, contrary to the statute, and avers that the bond was disapproved and rejected by the board of trustees, and that they notified plaintiff that they had rescinded their action and had advertised for new bids, without further averment, shows on its face that the alleged contract sued upon never existed, and never could exist, and a general demurrer thereto was properly sustained, without leave to amend.

ID.—FAILURE TO GIVE STATUTORY BOND NOT MATTER OF DEFENSE.—Where the plaintiff has assumed to set forth all of the facts, and that the alleged statutory bond set forth was rejected for the reason appearing upon the face of the complaint, that it did not comply with the statute, and that the bond was rejected on that ground, besides for a different reason, it cannot be tenably claimed that the failure to give the statutory bond should be pleaded as a defense, and cannot be taken advantage of by demurrer.

APPEAL from a judgment of the Superior Court of Alameda County. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Langan & Mendenhall, and Emil Pohli, for Appellant.

Wm. H. Donahue, District Attorney, and Walter J. Burpee, Deputy District Attorney, for Respondents.

LENNON, P. J.—This is an action upon an alleged contract which it is claimed that the defendants made with the plaintiff for personal services as a supervising architect and for plans and specifications of a proposed new school building in Pleasanton school district. A general demurrer, grounded upon the insufficiency of the facts stated in plaintiff's complaint to constitute a cause of action, was sustained without leave to amend. Thereupon judgment was ordered and entered, denying plaintiff any relief and awarding costs to

the defendants, from which the plaintiff has appealed upon the judgment-roll.

The complaint in substance and effect alleges that the defendants, as the board of school trustees for Pleasanton school district, in accordance with the requirements of an act to regulate the erection of public buildings and structures (Stats. 1871-72, p. 925), invited architects generally to submit plans and specifications for the erection of a proposed new school building. In the published notice inviting the competition of architects it was specified that the defendants, as the board of trustees, were authorized to expend \$26,000 in the construction of the building, and that a premium of three and one-half per cent of the contract price would be allowed to the successful architect upon the adoption of his plans and specifications, and that the architect whose plans and specifications were finally adopted would be required to superintend the erection of the building, for which he would be paid, in addition to the original premium, a fee of one and one-half per cent of the contract price. It was further specified in said notice "that prior to awarding any premium for said plans and specifications said board would require said architect to give a good and sufficient bond . . . in the penal sum of five thousand dollars, to be approved by the board of trustees, and conditioned that within sixty days from the date of said bond the said architect will, on presentation to him, enter into a contract containing such conditions and provisions as may be required of him by such board of trustees."

Within the time required by the notice plaintiff prepared and submitted to the defendants plans and specifications for the proposed building, and thereafter, it is alleged, the defendants accepted and adopted the same, and employed the plaintiff as the architect of the proposed building, and directed that he give a bond in the sum of \$5,000 in accordance with the requirements of its published notice and the act hereinbefore referred to.

Subsequently, on September 14, 1909, the plaintiff prepared and delivered to the defendants a bond in the specified amount, dated August 19, 1909, and conditioned among other things that, within sixty days from the date of the bond, the plaintiff would "on presentation to him enter into a contract containing such provisions and conditions as may be

required by the school district and board of trustees thereof, etc."

The defendants refused to approve this bond, for the reason, affirmatively alleged in the complaint, that they "had received some information that the proposed school building could not be constructed for \$26,000, and that said building would be unsafe and unfit for occupancy as a school building if built according to the plaintiff's plans and specifications, and for the further reason that said bond was dated August 19, 1909, instead of the day of delivery."

Immediately following the rejection of the bond the defendants, by resolution, rescinded the previous action of the board in the matter, and advertised for other plans and specifications, and notified plaintiff of its action.

It is not alleged in the complaint that the defendants presented any contract to the plaintiff for execution, or that his plans and specifications were ever used by the defendants, or that the proposed building was ever erected.

In support of the judgment the defendants rely mainly upon the contention that the plaintiff's complaint does not and cannot be made to state a cause of action, because it affirmatively appears from the facts pleaded that the contract sued on was never legally consummated, in this, that the bond furnished by the plaintiff was not conditioned and approved as required by the law and the notice calling for the submission of plans.

The act of April, 1872, under which the proceedings for the erection of a school building were inaugurated, provides in effect that when by any statute of this state power is given to any board to erect any public building, it shall be the duty of said board to advertise for plans and specifications, and to state in the advertisement the amount authorized by law to be expended in the erection of the building and the premium awarded to the contractor whose plans and specifications may be adopted; and that "whenever the plans and specifications of any architect shall be adopted" the board must "before any premium shall be awarded for such plans and specifications, require such architect to execute and file with the . . . board of trustees . . . a good and sufficient bond . . . in the penal sum of five thousand dollars, to be approved by the . . . board of trustees . . . and conditioned that, within sixty days from the date of said bond, he will, upon presentment

to him, enter into a contract containing such provisions and conditions as may be required by such board of trustees . . . and also conditioned that he will give such further bond to secure the faithful performance of such contract . . . in the event that such board should within said sixty days" require said architect to enter into a contract to erect the building at the price specified in the published notice.

The concluding clause of the act provides that all contracts entered into in violation of the act shall be null and void.

It is the plaintiff's theory that the allegations of his complaint show a completed contract not only for his plans and specifications, but for his individual services as well as superintendent of the proposed building, and having, as he claims, performed all the conditions required of him by the law and the published notice of the defendants, they must respond in damages for the alleged breach of the contract.

Plaintiff construes the statute in question to mean that the approval of the board is not a condition precedent to the payment of the premium to the architect whose plans have been adopted, and that the only purpose of the bond is to insure the proper performance of any subsequent contract which the board may make with the architect. In order to sustain this construction of the statute it would be necessary to first read out of it the clause which provides that "Whenever the plans and specifications of any architect shall be adopted such board of trustees . . . shall, before any premium shall be awarded for such plans and specifications, require such architect" to execute a bond, to be approved by the board, and conditioned that "within sixty days from the date of said bond he will, upon presentment to him, enter into a contract," etc. A fair construction of the act in question compels the conclusion, it seems to us, that it empowers the defendants to accept the plaintiff's plans and specifications only upon the condition of the execution and approval of the required bond, and that therefore two things must happen before a contract with an architect can be legally consummated and a premium awarded, namely, delivery and adoption of the plans and specifications, and the execution and approval of the required bond. (*Tilley v. County of Cook*, 103 U. S. 155, [26 L. Ed. 374]; *Mann et al. v. Town of Rochester*, 29 Ind. App. 12, [63 N. E. 874]; *Walsh v. St. Louis Exposition*, 101 Mo. 534, [14 S. W. 722]; *Smithmeyer*

v. *United States*, 147 U. S. 342, [37 L. Ed. 196, 13 Sup. Ct. Rep. 321].)

In the case at bar but one of the enumerated essentials of the statutory contract is pleaded as having been performed, namely, the presentment and adoption of the plans and specifications. The other essential—the giving and approval of the required bond—it affirmatively appears from the allegations of the plaintiff's complaint, has never been complied with. True, a bond was presented for the approval of the defendants, but, as appears from the complaint, the condition of the bond in the material matter of time was radically different from the condition prescribed by the statute; and if, as we think, the adoption of plans and specifications was, in obedience to the requirements of the statute, conditional upon the execution and approval of the required bond, then, in the absence of such a bond, duly approved, no valid contract could be entered into by defendants with the author of such plans and specifications. If we are correct in this conclusion, it follows that the complaint does not and cannot be made to state a cause of action.

It was suggested in the plaintiff's brief that, even if it be conceded that plaintiff failed to give the statutory bond, this was a matter which should be pleaded as a defense, and that it cannot be taken advantage of by demurrer. This contention is untenable. The plaintiff undertook to plead all of the circumstances of the transaction, apparently in anticipation of any defense which might be available to the defendant. He is bound by the facts pleaded in his complaint; and as it is apparent upon the face of the complaint that those facts do not and cannot be made to state a cause of action upon a completed and valid contract, the demurrer was correctly sustained without leave to amend.

The judgment appealed from is affirmed.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 830. First Appellate District.—March 11, 1912.]

WILLIAM P. McDERMOTT, Respondent, v. THOMAS CATFIELD and EDWARD G. VINZENT, Copartners, etc., Appellants.

CONTRACT TO SELL LAND IN SAN FRANCISCO—DEPOSIT—DESTRUCTION OF RECORDS IN TWO DAYS—UNMERCHANTABLE TITLE—ACTION FOR MONEY HAD AND RECEIVED.—Where a contract to sell and purchase land in San Francisco was made April 16, 1906, and \$500 was paid on account of the price under an agreement allowing the purchaser twenty days to examine the title, and if found defective, the seller was to be allowed thirty days in which to perfect the title, in default of which the deposit was to be returned, and by the destruction of the records of San Francisco by fire April 18, 1906, a merchantable title under the terms of the contract was rendered impossible, the purchaser had the right to disaffirm it and recover the deposit in an action for money had and received.

ID.—NOTICE OF DEFECTIVE TITLE UNDER THE CONTRACT NOT REQUIRED—DEFECTIVE NOTICE IMMATERIAL.—Upon the destruction of the records before anything was done under the contract beyond the payment of the money, no notice of defective title mentioned in the contract to be given by the purchaser within twenty days was necessary, as it would have been an idle and useless act, which the law never requires; and it cannot be held, under the circumstances of the case, that a defective notice would disentitle the purchaser to the return of his deposit.

ID.—ABANDONMENT OR MUTUAL RESCISSION OF CONTRACT NOT REQUIRED TO MAINTAIN ACTION BY PURCHASER.—The evidence in the case was not required to show an abandonment or mutual rescission of the contract by both parties, in order that the purchaser may maintain an action of money had and received to recover the deposit. It is sufficient to sustain the action that the evidence shows that the title was essentially defective, and that it was impossible for the vendor to remedy the defect and convey a perfect title.

APPEAL FROM JUDGMENT NOT TAKEN IN TIME—DISMISSAL.—An appeal from the judgment not taken in time must be dismissed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Dorn & Dorn & Savage, for Appellants.

Breen & Kelly, for Respondent.

KERRIGAN, J.—This is an action for money had and received, to recover \$500, a deposit paid upon the purchase price of a parcel of real estate.

On or about the sixteenth day of April, 1906, plaintiff agreed in writing to purchase a certain described piece of real estate in the city and county of San Francisco, and he paid to the defendants on account of the price thereof the sum of \$500. The agreement in effect provided that he should have twenty days in which to examine the title and consummate the sale. If the title was found to be defective, the seller was to be allowed thirty days after notice thereof to perfect the same, in default of which the deposit was to be returned.

At the trial it was admitted by the parties that on the eighteenth day of April, 1906, the records in the office of the county recorder of the city and county of San Francisco were destroyed by fire, so that after said conflagration there existed no record title to said property.

No notice of defective title was given by plaintiff, but on June 15, 1906, he caused notice of cancellation to be served on the defendants, based upon what may be conceded to have been untenable grounds. Accompanying this notice of rescission was a demand upon defendants for the return to plaintiff of the \$500 deposit.

Judgment for plaintiff was entered as prayed, from which defendants appeal, as also from an order denying their motion for a new trial.

The record having been destroyed, it was impossible for the defendants to convey to plaintiff a merchantable title within the time contemplated by the contract. Consequently notice of defective title mentioned in the contract was not necessary in order to entitle the plaintiff to maintain this action. Such notice would have been an idle and useless act, which the law never requires. (*Title Document Co. v. Kerrigan*, 150 Cal. 289, [119 Am. St. Rep. 199, 8 L. R. A., N. S., 682, 88 Pac. 356]; *Hooe v. O'Callaghan*, 10 Cal. App. 567, [103 Pac. 175]; *McCroskey v. Ladd* [Cal.], 28 Pac. 216; *Cabrera v. Payne*, 10 Cal. App. 675, [103 Pac. 176]; *Read*

v. *Walker*, 18 Ala. 323; *Pate v. McConnell*, 106 Ala. 449, [18 South. 98].)

As, under the circumstances of this case, no notice was required, it cannot be held that a defective notice would disentitle the plaintiff to the return of his deposit.

It is asserted that the evidence in the case does not show that there was an abandonment or mutual rescission of the contract, and therefore, so it is argued, this action, being one for money had and received, cannot be maintained. As the evidence shows that the title was defective, and that it was impossible for the owner within the time prescribed by the contract to remedy the defect and convey a perfect title, the plaintiff was at liberty to disaffirm the contract, and entitled to sue for the deposit in this form of action. (2 Ency. of Pl. & Pr. 1018, 1019, and note on p. 1019; *Daly v. Bernstein*, 6 N. M. 380, [28 Pac. 764]; *Demasney v. Gravelin*, 56 Ill. 93.)

The appeal from the judgment was not taken in time, and is hereby ordered dismissed. The order denying a new trial is affirmed.

Lennon, P. J., and Hall, J., concurred.

[Civ. No. 1002. First Appellate District.—March 11, 1912.]

H. H. McPIKE, Appellant, v. H. B. MEHRMANN, Administrator, etc., Substitute in Place of ALLEN SMALL, Executor of Will of OLIVE COULSON, Deceased, et al., Respondents, and FRANK McMANN, ELLA F. McMANN, HATTIE DONLON, and FRANK McMANN, as Executor of the Will of ROBERT COULSON, Deceased, Appellants.

STATUTORY PROCEEDING BY HUSBAND TO DETERMINE VESTING OF COMMUNITY PROPERTY IN NAME OF DECEASED WIFE—REPRESENTATIVES OF DECEASED WIFE NOT CONCLUDED IN PARTITION.—A statutory proceeding, under section 1723 of the Code of Civil Procedure, to have it determined that real property standing in the name of the deceased wife was community property which vested in the husband at the time of her death, does not constitute a conclusive adjudication against the representatives of the deceased wife, who were in the

possession of the property, and were not parties thereto, and were not before the court, so as to give it the effect of an equitable decree as against them; and it may be shown by them in a subsequent action for partition, in which the representatives of the deceased wife and of the deceased husband are before the court, that the property was the separate property of the wife, and it may be so found and adjudged by the court.

ID.—PURPOSE OF STATUTORY PROCEEDING—CONDITIONAL EFFECT OF DECREE.—The statutory proceeding taken under section 1723 of the Code of Civil Procedure is only intended as a means to have it determined that a person is dead, upon whose death the asserted right of another person depends, and not to have the validity of that right conclusively adjudicated. The decree in the proceeding, as respects persons not parties, merely determines conditionally that if the party petitioning has any asserted right or title accruing on the death of another person, such right or title has accrued.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

John T. Thornton, for Plaintiff-Appellant.

H. W. Bradley, for Frank McMann et al., Appellants.

Robert Edgar, and Edward C. Harrison, for H. B. Mehrmann, Administrator, etc., Respondent.

KERRIGAN, J.—This is an appeal by plaintiff from a judgment against him and from an order denying his motion for a new trial, in an action for the partition of certain real property.

January 20, 1906, Olive Coulson died, leaving a last will and testament, which was duly admitted to probate, and Allen Small qualified as executor thereof. At the time of her death the three parcels of real property, the subject of this controversy, stood of record in her name, and she left as her surviving spouse Robert Coulson. September 26, 1906, Robert Coulson filed a petition under the provisions of section 1723, Code of Civil Procedure, and after ten days' notice by publication in a daily newspaper a hearing was had, and the court made its decree, adjudging that the property here

involved was community property, and vested absolutely in Robert Coulson, as the surviving spouse of Olive Coulson, upon her death. The executor of the estate of Olive Coulson, deceased, although in possession of the property at the time, received no personal notice of said proceedings, and consequently did not appear therein.

September 6, 1906, Robert Coulson made and executed a deed to an undivided one-third of said real property to the plaintiff herein. Subsequently Robert Coulson died, leaving a will, and Frank McMann was appointed executor of his estate. November 8, 1906, this action was commenced against the estate of Olive Coulson and against the executor and devisees under the will of Robert Coulson, the plaintiff alleging the ownership of the property to be exclusively in himself and in the estate of Robert Coulson as tenants in common, and praying for a partition thereof.

All the defendants except the executor of the estate of Olive Coulson, deceased, filed answers admitting the allegations of the complaint. Said executor filed an answer, denying that the plaintiff was the owner or holder of any estate in said real property, and setting up that the estate of Olive Coulson, deceased, was the owner in fee simple and in possession thereof.

During the pendency of the cause Allen Small, the said executor, died, and H. B. Mehrmann, being appointed administrator of the estate of Olive Coulson, deceased, was substituted in his place as defendant.

At the trial the executor of the estate of Olive Coulson, deceased, introduced evidence tending to show that she at the time of her death and prior thereto was the owner in fee simple absolute of all of the real property described in the complaint. Plaintiff, on the other hand, depended entirely on the decree in the proceedings instituted by Robert Coulson above referred to.

The court by its decree adjudged that the real property in question belonged to the said estate of Olive Coulson, deceased, in fee simple, and quieted the title of said estate against the plaintiff and against the codefendants of said executor.

Section 1723, Code of Civil Procedure, provides that if any person shall die who was the owner of a life estate, or if such person at the time of his death was one of the spouses

owning a homestead, or if such person was a married woman who at the time of her death was the owner of community property which passed upon her death to a surviving husband, any person interested in the property may file a petition setting forth the facts, "and thereupon, after such notice by publication or otherwise as the court may order, the court shall hear such petition and the evidence offered in support thereof; and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded."

The question in controversy here was recently squarely decided against the position of the appellants in the case of *King v. Pauly*, 159 Cal. 549, [115 Pac. 210]. There, at the time of the death of one Cornelia Chase, there stood of record in her name certain real property which had been acquired while she was the wife of one Levi Chase. After her death, pursuant to proceedings instituted by said Chase under the terms of said section 1723, Code of Civil Procedure, the property was held to be community property, and consequently to vest absolutely in him as the surviving spouse of Cornelia. Subsequently the plaintiff—who derived title from said Cornelia—claiming that said property was her separate property, commenced an action to quiet his, said plaintiff's, title thereto. After declaring that if all the persons interested in the estate of Cornelia Chase had actually appeared in the proceeding or were regularly brought within the jurisdiction of the court by service of process, the proceeding would be treated as an ordinary action in equity, and the superior court would have jurisdiction to determine the title to the property, the court held (Mr. Justice Angelotti writing the opinion) that as "neither any legal representative of the deceased Cornelia Chase nor all of her heirs were shown to have appeared or to have been served with process," the court "was bound to consider the decree solely as one given in the special proceeding prescribed by section 1723 of the Code of Civil Procedure," and to give it such effect as a proper construction of that section warranted.

So construing it the court decided that the proceeding was only intended as a means "to have it determined that a certain person is dead, upon whose death the asserted right of another person depends, and not one to have the validity of the right conclusively adjudicated." Quoting from *Hansen v. Union Savings Bank*, 148 Cal. 157, [82 Pac. 768], the court further said: "The decree in the proceeding merely determines that, if the party petitioning has any asserted right, or title, accruing on the death of another person, such asserted right or title has accrued. . . . It is often convenient and important to those interested in or examining a title to have some record evidence of the death of a life tenant, a homestead claimant, or other person upon whose death some right or estate vests."

On the authority of that case and the cases there cited, the judgment and order appealed from are affirmed.

Lennon, P. J., and Hall, J., concurred.

[Civ. No. 1053. Second Appellate District.—March 11, 1912.]

D. J. CARPENTER, Respondent, v. C. P. GROGAN,
Appellant.

SALE OF GROWING OLIVE CROP—LIMITED PURCHASE OF "FOUR TONS OF OIL OLIVES"—DESIGNATION BY PURCHASER OF RESIDUE AS "PICKLING OLIVES"—WARRANTY OF QUALITY NOT IMPLIED.—Under a contract for the sale of an olive crop growing upon the trees of the vendor, not sufficiently ripe for gathering, where a smaller price per ton was expressly limited to "four tons of oil olives," and the residue of the crop was designated by the purchaser as "pickling olives," at a higher price per ton, all olives to be carefully picked by the purchaser and paid for as agreed, after delivery, in the absence of an express warranty that the residue were "pickling olives," none is implied from such designation, and any loss of quality of part of the residue by frost and wind, before gathering, rendering part thereof unmerchantable, otherwise than as "oil olives," must fall upon the purchaser.

Id.—FINDINGS UPON CONFLICTING EVIDENCE NOT REVIEWABLE.—Where the questions of fact determined by the findings of the trial judge rest, in the main, upon evidence of a conflicting nature, the findings are not subject to review upon appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

Powers & Holland, for Appellant.

Geo. P. Adams, and Curtis & McNabb, for Respondent.

JAMES, J.—Appeal from a judgment entered in favor of plaintiff, and from an order denying defendant's motion for a new trial. On the 19th of August, 1909, the following contract was entered into between plaintiff and defendant:

"This agreement made and entered into by and between D. J. Carpenter, and Chas. P. Grogan of Los Angeles, both parties of the state of California, is to the effect that Chas. P. Grogan agrees to purchase of said D. J. Carpenter his crop of olives now growing on the trees at Del Rosa at the following prices:

"One hundred & ten dollars per ton on cars at Del Rosa—less \$55.00 per ton on four tons agreed on as Oil Olives. Olives to be picked in a careful manner for Ripe Pickling Olives. Payment to be made within 30 days from date of shipment.

"I hereby acknowledge receipt of \$1.00 as first payment on the Olives.

"C. P. GROGAN.

"D. J. CARPENTER."

At the time this contract was executed plaintiff was the owner of an olive orchard upon which the fruit which was made the subject of the contract was then growing. At that time the olives had about matured, but were not in the state of ripeness desired by the vendee. Shipment of the crop commenced in the latter part of October and continued from time to time until the 17th of February. Certain payments were made on account of the purchase price agreed to be paid by the vendee, but at the time shipment of the crop was concluded defendant contended that only a balance of \$290.35 was due, while the plaintiff insisted that the amount was \$1,666.17. This dispute arose on account of the fact that a portion of the olives before delivery to the transportation

company had become damaged by frost and other action of the elements. It was the contention of the defendant that his contract should be so construed as to require the plaintiff to accept for all olives delivered which were not suitable for pickling a price which would equal the reasonable value of such olives if purchased to be used for manufacturing oil. It was admitted that all of the olives delivered could be manufactured into oil, but that for pickling purposes a special standard of size, firmness and ripeness was required. Defendant in his answer alleged that as to the damaged olives, plaintiff had agreed subsequent to the making of the contract set out above that he should receive only the reasonable market price therefor. The trial court, however, found against the contention of the defendant as to the making of this subsequent agreement, and found, further, that all of the olives were picked in a careful manner, and that under the terms of the contract there was due a balance of \$1,537.75 to the plaintiff, for which amount judgment was entered. In the findings of the court it was further recited that some of the olives had been damaged by frost or wind. It appeared by the testimony that the olives were all merchantable for the purpose of being manufactured into oil. The trial court determined that defendant was liable to plaintiff under the contract for all olives delivered at the rate of \$110 per ton, except for four tons, for which it was recited in the contract payment was to be made at the rate of \$55 per ton. All of the questions argued depend for their solution upon what construction should be given to the contract. If the defendant may be said to have reserved for his benefit a condition to be implied from the written contract of sale that the olives to be delivered, except the four tons agreed upon as oil olives, should be suitable for pickling purposes, otherwise that they should not be paid for at the rate of \$110 per ton, then the various objections made would appear to be of substantial merit. However, we agree wholly with the trial court in its construction of the contract of sale. The crop of olives was then growing upon the trees and was about matured when the defendant made his contract of purchase; that contract contains no terms from which there can be construed any warranty of quality as to the fruit contracted for; on the contrary, it was expressly recited that it had been agreed that four tons only of the olives were to be paid for at \$55 per ton as "oil

olives." The crop was purchased as a crop then in existence and not one to be grown in the future; that crop was not destroyed, but was delivered to the defendant by the plaintiff. If the defendant expected to insist upon a certain standard of size, ripeness, or other quality, to be possessed by the fruit at the time it was delivered, then that matter should have been expressed in the written agreement of sale; otherwise the vendor could not be bound by it. This court recently had occasion to construe a similar contract in the case of *Kenney v. Grogan*, 17 Cal. App. 527, [120 Pac. 433], and questions almost identical with those presented here were there fully considered and determined adversely to this defendant's present contentions. The decision rendered in that case and the authorities therein cited are applicable here. The questions of fact determined by the findings of the trial judge rest in the main upon evidence of a conflicting nature, and therefore those findings are not subject to review.

Upon the whole case as presented on the record submitted to us, in our opinion, there is no error shown.

The judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 8, 1912.

[Civ. No. 924. First Appellate District.—March 12, 1912.]

J. KASCH, Respondent, v. LABOR TEMPLE ASSOCIATION, Appellant.

SALE OF LAUNDRY BUSINESS WITH PERSONAL PROPERTY—FALSE REPRESENTATIONS AS TO EXTENT OF BUSINESS—DEDUCTION OF DAMAGES FROM PRICE—RESCISSION IMPRACTICABLE.—Upon the sale of a laundry business, with the goodwill thereof, with horses, wagons, harness and storm robes, where \$100 had been paid upon the price, and a balance of \$500 was claimed thereupon, and defendant alleged that the contract was obtained by false representations, and claimed a rescission, and the court found that defendant was damaged to

the extent of \$100 by the false representations, that the business had been delivered to defendant, and cannot be fully restored, that one of the horses had been sold, and no return of receipts was offered, it is held that the court did justice between the parties by deducting the \$100 from the balance due, and rendering judgment for plaintiff for the residue.

ID.—RESTORATION OF STATUS ESSENTIAL TO RESCISSION OF CONTRACT.—

The full restoration of the *status* of the other party is essential to the right of rescission of a contract therewith on the ground of alleged fraud; and where, upon the sale of a business, it becomes impossible, as the result of the execution of the contract, to place the parties *in statu quo*, there can be no rescission of the contract.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Frank H. Benson, for Appellant.

Rogers, Bloomingdale & Free, for Respondent.

HALL, J.—This is an appeal from a judgment in favor of plaintiff and an order denying defendant's motion for a new trial.

Plaintiff and one Bloemer were copartners, and as such conducted a laundry business under the name of the Standard Electric Laundry, and, as is alleged in the complaint, on the twenty-seventh day of February, 1909, "entered into a contract in writing with the defendant Labor Temple Association, whereby they agreed to sell to said defendant their aforesaid laundry business and the goodwill thereof, also two horses, four wagons, two sets of harness and two storm robes, for a consideration of six hundred (600) dollars, to be paid as follows, to wit: 'One hundred (100) dollars upon the signing of said agreement, and five hundred (500) dollars upon the delivery of said business, such delivery and payment to be made within two weeks after the making and execution of said contract as aforesaid.' "

Plaintiff alleged full compliance with the conditions of the contract by the vendors, an assignment by Bloemer to plaintiff, and refusal to pay the balance of \$500 by defendant.

By way of defense defendant pleaded that the execution of said agreement was procured by certain false and fraudulent representations as to the amount of business being done by the vendors, made by plaintiff, and a rescission and offer in writing, made March 25, 1909, to return all property received under the agreement, conditioned on plaintiff's paying to defendant the \$100 paid on the execution of the contract of sale, and also denied performance by the vendors, save as to the delivery of the chattels mentioned.

The court, among other things, found that the contract was procured through the false and fraudulent representations of plaintiff, as alleged in the answer. That immediately upon the execution of said contract plaintiff and his assignor retired from the laundry business, and within the time limited by the contract delivered to the defendant the horses, wagons, harness and robes mentioned in the contract, and the business actually being done by the Standard Electric Laundry. That defendant has continued to carry on said business, using said personal property in connection therewith, but has disposed of one of the horses mentioned in said contract and delivered to defendant. That defendant offered to rescind said contract and to return said personal property and business, as alleged in the answer, but that defendant when said offer was made "was not, and is not now, able to restore said plaintiff and his assignor, or either of them, to the situation they were in with respect to said business at the time said contract was made and said property and business delivered to the defendant as aforesaid, nor to place said plaintiff and his assignor, or either of them, *in statu quo*."

The court further found that defendant had been damaged by the false representations and failure of plaintiff in the sum of \$100, and therefore deducted this amount from the balance due under the contract, and gave judgment for plaintiff for the balance, to wit, \$400.

The first point urged by appellant seems to be that the court erred in finding that the vendors delivered the business actually being done by them to defendant. The finding as made is supported by the evidence.

The business of the vendors consisted of two routes. The driver of one of these routes was at once employed by defendant, and took charge of that route, and collected the work therefrom. Plaintiff went with the same driver for two weeks

over the other route, and, according to his testimony, called on all of the customers on that route, save two, who by other evidence were shown to have moved into the other route. It is true the evidence of plaintiff shows that a goodly portion of the customers refused to patronize defendant, and in that sense he was unable to deliver such business. But the delivery which he did make was, we think, a substantial compliance with the contract, so far as delivery of the business was concerned.

The court, however, found that the contract was procured through false representations as to the business being done by the vendors, and this finding must be accepted as correct. The representation was to the effect that the business of the vendors amounted to between \$100 and \$125 per week, and the court found that it was substantially less than \$100 per week. This, of course, justified a rescission by defendant if promptly made on discovery of the fraud, unless the situation of the parties had been so changed through the execution of the contract that the *status quo* could not be restored. The court found that at the time of the attempted rescission and at the trial defendant was not able to restore plaintiff and his assignor to the situation they were in with respect to said business when the business was delivered to defendant. It is urged that the evidence does not support this finding.

We think it does. The vendors immediately retired from the laundry business, as the court found that they had agreed to do. Defendant at once advertised that it had purchased the business of the vendors. A goodly portion of the customers refused to patronize defendant, and doubtless transferred their patronage to other laundries. The evidence shows that the business done by defendant on the routes transferred by plaintiff to defendant decreased twenty per cent in the second week from the amount done in the first week. It is clear that the defendant could not return to the vendors the business that they had in fact delivered to defendant. It is highly probable that many of the customers would refuse to go back to the vendors, if they should return to the business, but would insist on giving their patronage to defendant. The *status quo* could not be restored.

The situation brings the case within the rule laid down in the ably considered case of *Snow v. Allen*, 144 Mass. 546, [59 Am. Rep. 119, 11 N. E. 764], where it is said: "A civil pro-

ceeding is not intended to inflict punishment upon anyone, still less a punishment which shall inure to the advantage of another, who is sufficiently protected when he has received full indemnity for all the injury he has suffered."

Brockhaus v. Schilling, 52 Mo. App. 75, is a case which in its essential features is very similar to the case at bar. It was a case where a saloon business had been sold. The buyer brought an action to rescind, alleging fraud. The court held that because the seller could not be restored to his original position the action would not lie; that no right of rescission exists "where there has been such a change of circumstances, through lapse of time or otherwise, as disables the purchaser from putting the seller *in statu quo*."

Where upon the sale of a business it becomes impossible, as a result of the execution of the contract, to place the parties *in statu quo*, there can be no rescission of the contract. (*Bailey v. Fox*, 78 Cal. 389, [20 Pac. 868].)

In the case at bar there was evidence to the effect that the chattels sold to and still used by defendant were of the value of \$300 and more. This left but \$300 as the supposed value of the goodwill of the business sold. Because of the misrepresentations as to the amount of business done the court allowed damages to defendant in the sum of \$100. The defendant is still in full possession of the chattels (save one horse, which it sold), and carrying on the business transferred to it, and has at all times been in receipt of the profits therefrom, and has never made any offer to account for such profits.

It was held in *Martin v. Burns Wine Co.*, 99 Cal. 355, [33 Pac. 1107], that the failure to offer to restore a small amount of the dividends received from stock which were the subject of a fraudulent sale was fatal to the right to rescind.

On the whole case the judgment rendered by the learned trial judge seems to do justice, and we can see no reason for disturbing the action of the trial court.

The judgment and order are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1075. Second Appellate District.—March 14, 1912.]

J. F. HALL-MARTIN COMPANY, a Corporation, Respondent, v. W. E. HUGHES, Appellant.

R. B. MARTIN, Respondent, v. W. E. HUGHES, Appellant.

CONTRACT TO SELL LAND—IMPROVEMENTS BY PURCHASERS—RECONVEYANCE AFTER DEFAULT—FORECLOSURE OF DEEDS OF TRUST—CONSIDERATION FOR ASSUMPTION OF DEBTS.—Where, under a contract by the defendant to sell land, the purchasers in possession subdivided it into lots and improved the same at large expense, and incurred large indebtedness, and after default in the payment of purchase money to defendant, the property was reconveyed to defendant under an agreement that defendant should assume and "pay to Martin and Hall \$8,200 for street improvements," which in fact included other improvements aggregating that sum, besides "\$8,700 for mortgage indebtedness," which was in fact for deeds of trust foreclosed in that sum, it is held that the equity of redemption acquired by the reconveyance was a sufficient consideration for the agreement to assume the whole amount of such debts.

Id.—CONSTRUCTION OF AGREEMENT TO PAY SUM FOR STREET IMPROVEMENTS—PAROL EVIDENCE TO EXPLAIN INTENTION INADMISSIBLE.—It is held that in the construction of the agreement to pay the sum of "\$8,200, street improvements," the amount specified is the controlling factor, and not the specification of the matter to which the payment should be applied; and that the defendant was obligated by his agreement to pay that full sum. And since the contract is susceptible of construction on its face, parol evidence was not admissible to explain the intention of the parties to the contract.

Id.—CONTRACT MADE FOR BENEFIT OF THIRD PARTY—RIGHT OF ENFORCEMENT.—Under section 1559 of the Civil Code, "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." While such contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to such third party.

Id.—ESTOPPEL OF DEFENDANT—ACQUIESCENCE IN RIGHT OF PURCHASERS TO CONTRACT FOR TOTAL DEBT AS UPON A SINGLE ITEM.—It was the right of the purchasers, if conscious of an indebtedness to plaintiff approximating \$8,200, to contract with the defendant that he should pay, as for any single item, an amount sufficient to cover all their obligations to plaintiff, and defendant having acquiesced in this, and agreed to pay such gross sum, and having accepted the conveyance and retained its benefits, should not be heard now to say that the item specified was less than the aggregate amount agreed to be paid

as part of the purchase money, such aggregate amount representing the *bona fide* indebtedness of his grantors to plaintiff at the time.

ID.—DIVISION OF ITEMS OF CREDIT IN TWO SUITS.—The fact that different items of the indebtedness, which might have been recovered by the plaintiff in one suit, were divided and set forth in two suits, such election not having been objected to, and the judgments rendered in the two actions being correct in amount, and within the limits of the liability of defendant to plaintiff, after having paid part thereof, the judgments will not be disturbed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Woodruff & McClure, for Appellant.

G. C. DeGarmo, for Respondent.

ALLEN, P. J.—The facts disclosed by the record are these: During the year 1909 defendant entered into an agreement in writing with Daniel Stone and Paul H. Blades for the sale of certain real property in Los Angeles county. Stone and Blades entered into possession and formed a corporation known as the Central Square Company, which corporation was merely a corporate agency in and about the subdivision and improvement and sale of the property. Default being made by Stone and Blades as to certain payments, they entered into an agreement with defendant through which Stone and Blades and the corporation conveyed all claim to the property so contracted to purchase, in consideration of which defendant agreed to pay certain indebtedness theretofore created by Stone and Blades and the corporation in an effort at subdivision and sale of the property. This agreement, in so far as material to a disposition of the questions presented upon this appeal, recited as follows: "[Hughes] promises and agrees to assume and pay all those debts of the Central Square Company, as follows: Martin and Hall for street improvements, eight thousand two hundred dollars (\$8200); mortgage indebtedness on houses erected on said premises, three thousand seven hundred dollars (\$3700); with interest on all of said claims." In this agreement were men-

tioned certain other debts not necessary to specify. Plaintiff had before this agreement performed the engineering work necessary in laying out the streets and platting the tract, through which an indebtedness of \$532.75 arose. In addition, plaintiff had done the work of making and oiling the streets, which work, exclusive of the engineering work, was of the value of \$5,957.55; in addition to which plaintiff had constructed three houses on certain lots of the tract, upon which there remained due to plaintiff the aggregate sum of \$1,665.48. Before this last agreement with defendant was executed mechanics' liens had been filed by plaintiff covering these items of indebtedness and actions thereon were pending. The lots upon which the houses had been constructed and covered by the liens had been conveyed to Stone and Blades, and what was denominated "mortgages" in the agreement were in fact deeds of trust. These deeds of trust had been foreclosed before the rescinding agreement was entered into. Plaintiff brought two suits, one for \$7,627.09 for work done and materials furnished in the improvement of the real property described in the agreement, and the other for \$532.75, as a part of the \$8,200 agreed to be paid for the improvement of said property. It is shown by the record that as a matter of fact the cost of the street improvements proper was \$5,957.55. This amount defendant paid and plaintiff received on account. Judgment was accordingly rendered in the first-mentioned suit for \$1,669.44 and in the second for \$532.75, the aggregate of which two judgments, together with the amount paid, was a little less than the \$8,200 mentioned in the agreement. The court upon the trial found that Stone and Blades and the corporation had conveyed to defendant all of the premises described in the agreement, and that defendant was the owner and holder thereof. The court further found that the Martin mentioned in the agreement was plaintiff herein, and that the \$8,200 specified in said agreement included the indebtedness for work done by plaintiff in the improvement of the property. Motions for new trial were made and denied; and from the judgments rendered, and from the order denying the motions, defendant appeals. The two causes were by stipulation consolidated upon the trial and heard together, and the appeal is presented upon a single record.

We find no merit in appellant's first contention, namely, that the finding that defendant by the conveyance of Blades and Stone and the corporation became the owner and holder of all of the three lots had no support from the evidence. The deeds of trust, denominated mortgages in the agreement, had been foreclosed, and defendant by the agreement and reconveyance by Stone and Blades acquired the equity of redemption. This was sufficient consideration to support the promise made in the agreement with reference thereto. (*Bay v. Williams*, 112 Ill. 97, [54 Am. Rep. 209, 1 N. E. 340].) No question is presented as to the effect of a sale under power given in a deed of trust. Such deeds of trust not appearing in the record, it must be assumed that the only remedy afforded thereby was by way of foreclosure, and that the same were of a character warranting the court in entering a decree of foreclosure, and through which decree of foreclosure a right of redemption existed.

The controlling question involved relates to the construction which should be given the agreement assuming and agreeing to pay to plaintiff for street improvements the sum of \$8,200. The trial court determined that the amount specified was the controlling factor, and not the specification of the matter to which the payment should be applied. We are of opinion that the court did not err in so construing the agreement. Section 1559 of the Civil Code provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." While such contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party. The payment of \$8,200 to plaintiff was clearly a part of the purchase money agreed to be paid in consideration of the quitclaim of those in possession and who had made the improvements. "It is not the business of the defendant to go upon a tour of investigation as to the merits of plaintiff's claim against its grantors after agreeing to pay it." (*Washer v. Independent M. & D. Co.*, 142 Cal. 708, [76 Pac. 654].) Stone and Blades possessed the right, if conscious of an indebtedness to plaintiff approximating \$8,200, to contract with defendant to pay for any single item an amount sufficient to cover all obligations. This they seem to have done in the agreement entered into with defendant, by which they directed the payment of the aggre-

gate of such indebtedness upon one item. Defendant acquiesced in this and agreed to pay such gross sum, and accepted the conveyance and retains the benefits, and he should not now be heard to say that the item specified was less than the aggregate amount agreed to be paid as part of the purchase money; such aggregate amount representing a *bona fide* indebtedness of Stone and Blades to plaintiff at the time.

The views we have expressed render it unnecessary to consider the many specifications of error as to the action of the trial court in refusing to admit evidence tending to explain the intention of the parties. The contract being, in our opinion, susceptible of construction upon its face, evidence tending to explain the intention was not admissible.

While, in our opinion, it was competent for plaintiff to have brought a single action to recover the \$8,200, yet, having elected to bring two actions and no objection being made thereto, and the judgments rendered in the two actions being correct in amount and within the limits of the liability of defendant to plaintiff, no reason suggests itself why such judgments should be disturbed.

The judgment and order in each case are, therefore, affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1016. First Appellate District.—March 15, 1912.]

HATTIE M. KEARNEY, Respondent, v. JOHN PALMER, C. KNUDSON, JOHN DOE PETERSON, J. W. PIERSON, and MARY JANE SANDSTONE (H. B. MEHRMAN, Administrator, etc., Substituted in Place of JOHN PALMER, Now Deceased), Appellants.

VACATION OF DEFAULT JUDGMENT—GENERAL RULE AS TO REVIEW OF DISCRETION UPON APPEAL—ABUSE—BORDER LINE.—Under the general rule that the granting or denial of a motion to set aside a judgment by default is largely a matter of discretion to be exercised by the trial court, and that the action in granting or refusing the application will only be reversed where there is a clear abuse of discretion, it is held that while the present appeal from an order refusing to vacate a judgment by default appears to be near the

border line, yet this court is unable to say, in view of the entire record, that the trial court abused its discretion in denying appellants' motion.

ID.—RELIANCE OF SUBSTITUTED ATTORNEY UPON FALSE STATEMENT OF CLIENTS.—Where it appears that a substituted attorney relies upon the false statement of his clients appealing that the demurrer had not been disposed of, they should not be allowed to complain of the result of their own false statements; and where there are several statements in their joint affidavits which are shown to be untrue, the court was justified in distrusting all of their statements.

ID.—ACTION TO QUIET TITLE—INSUFFICIENT AFFIDAVIT OF DEFENSE—DEFENDANTS MERE SQUATTERS ON STATE LANDS.—Where the complaint of the plaintiff showed a cause of action to quiet title to land owned by the plaintiff, and the affidavit of defense filed with the motion to vacate the judgment for the plaintiff by default merely denied plaintiff's title upon information and belief, and clearly shows that defendants are mere squatters on land belonging to the state, with no title or claim of title to the premises sued for, it is held that this court, for that reason, is more readily inclined to affirm the action of the trial court in refusing to vacate the judgment.

ID.—CLAIM OF APPELLANTS THAT ORIGINAL ATTORNEY MISLED THEM—CONFLICT OF EVIDENCE.—Where there is a clear conflict of evidence as to the claim of the appellants that they were misled by their original attorneys as to whether the demurrer had been overruled, this court must assume that the trial court in denying the motion resolved all conflicts of evidence against the appellants.

APPEAL from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

N. Soderberg, for Appellants.

E. K. Taylor, for Respondent.

HALL, J.—This is an appeal from a judgment entered against the appellants upon their failure to answer to the complaint within the time allowed by the court upon overruling their demurrer to plaintiff's complaint.

The default of appellants was regularly entered on the twenty-third day of March, 1910. Subsequently appellants made a motion for an order to open said default, and to permit them to answer to the complaint, which motion was after

hearing by the court denied, and subsequently the judgment appealed from was entered.

The only question presented for determination upon this appeal is as to whether or not the court erred in denying the motion to open the default.

The grounds of the motion were that default had been entered against appellants through their excusable neglect and inadvertence. (Code Civ. Proc., sec. 473.)

At the outset it is hardly necessary to say that the granting or denial of a motion to set aside a default is largely a matter of discretion to be exercised by the trial court, and that its action either in granting or refusing the application will only be reversed where a clear case of abuse of such discretion is shown by the appellant. (*Garner v. Erlanger*, 86 Cal. 60, [24 Pac. 805]; *Coleman v. Rankin*, 37 Cal. 249; *Williamson v. Cummings*, 95 Cal. 652, [30 Pac. 762]; *Cass v. Hutton*, 155 Cal. 103, [99 Pac. 493]; *Ingrim v. Epperson*, 137 Cal. 370, [70 Pac. 165].)

While the present appeal presents a case that appears to be near the border line, we are unable to say, after an examination of the entire record before us, that the trial court abused its discretion in denying appellants' motion.

The complaint is in the usual form for an action to quiet title. Appellants, by their attorney, Hiram Luttrell, filed a general demurrer to the complaint January 22, 1910, which was overruled by the court February 11, 1910, and fourteen days allowed to appellants in which to answer to the complaint. Notice of this order was in open court waived by the attorney for appellants. The time to answer expired February 25, 1910.

Although Hiram Luttrell was the attorney of record for appellants, one Mr. Murphy was also acting with him for appellants. Appellants became dissatisfied with their attorneys, and on March 18, 1910, demanded and received from them all papers delivered to said attorneys in connection with said suit, and discharged said attorneys, and on the following day, March 19th, obtained from Mr. Luttrell a substitution of attorneys signed in blank, which had been prepared by the present attorneys of appellants, and was certainly returned to them not later than March 21st. On this day Mr. Soderberg, one of the present attorneys for appellants, examined the files of the court in this action, and of course discovered that a de-

murrer had been filed. He made no other examination to discover what action, if any, had been taken upon the demurrer, but, as stated in his affidavit, "relied upon the statement of my clients that the demurrer was undisposed of." In this connection it should be stated that there is in none of the affidavits any other reference to any such statement as having been made by said clients. There is, it is true, in the affidavit made by appellants, a statement that said Murphy and Luttrell had stated to them "that said demurrer . . . would not come up in court before the twenty-fifth day of March, 1910." The truth of this statement, however, was denied by the affidavit of Mr. Murphy; and we must assume that the court accepted the statement of Mr. Murphy as correct. Indeed, there are several statements in the joint affidavit made by the appellants that are quite certainly shown to be untrue, which justified the court in distrusting all their statements.

Mr. Soderberg's failure to discover that the demurrer had been disposed of was thus clearly the result of his having been misled by the false statement of appellants, who should not be allowed to complain of the result of their own false statement. On the other hand, if Mr. Soderberg did not rely on such statement, or if no such statement was made to him, it is clear that he did not take the usual and proper means to ascertain the fate of the demurrer. This could have been readily ascertained by examining the register of actions or the minutes of the court. In no case do the files of the court show the disposition of a demurrer until the judgment-roll is made up, which is not until entry of judgment.

We are the more readily inclined to affirm the action of the trial court because of other matters that appear in the record.

Appellants, with their motion, filed their proposed answer. While in this answer they deny, upon information and belief, the title of plaintiff, they clearly show that none of the appellants has or claims any title at all, save that they allege that each is in possession of some undescribed portion of the premises in suit, the title to all of which they allege to be in the state of California. It is quite clear from their tendered answer that they are simply "squatters," with no title or claim of title to the premises sued for.

It is not claimed that plaintiff or her attorney in any way misled appellants or their attorneys. The claim of appellants is that they were misled by their own original attorneys. In all the essential matters concerning the dealings between appellants and such attorneys, the record presents at least a case of conflict of evidence. We must assume that the court resolved all conflicts in the evidence as to the facts against appellants.

The judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1912.

[Civ. No. 1017. First Appellate District.—March 15, 1912.]

HATTIE M. KEARNEY, Respondent, v. J. W. PIERSON,
Appellant.

ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT—DISCRETION
NOT ABUSED—FALSE STATEMENT OF CLIENTS—INSUFFICIENT DE-
FENSE—CONFLICTING EVIDENCE.—Judgment affirmed on the author-
ity of *Kearney v. Palmer*, ante, p. 517.

APPEAL from a judgment of the Superior Court of
Alameda County. T. W. Harris, Judge.

The facts are similar to those stated in the opinion in
Kearney v. Palmer, ante, p. 517, with the exception stated by
the court.

N. Soderberg, for Appellant.

E. K. Taylor, for Respondent.

HALL, J.—This case is in all respects similar to the case
of *Hattie M. Kearney v. John Palmer et al.*, ante, p. 517, [123
Pac. 611], save that the action is one in ejectment and not

to quiet title, and for the same reasons the judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1912.

[Civ. No. 1081. Second Appellate District.—March 19, 1912.]

C. C. PATTON, Respondent, v. LOS ANGELES PACIFIC COMPANY, a Corporation, Appellant.

NEGLIGENCE—COLLISION BETWEEN INTERURBAN CARS—INJURY TO MOTORMAN—FAULT OF CONDUCTOR OF COLLIDING CAR.—An interurban railway company, though not liable under section 1970 of the Civil Code, as it stood prior to the amendment of 1907 thereto, is liable under that amendment for injury to a motorman of an interurban trolley car collided with by the negligence and fault of the conductor of a colliding independent trolley car.

ID.—CONSTRUCTION OF AMENDMENT—PURPOSE TO EXTEND EMPLOYEE'S LIABILITY.—Section 1970 of the Civil Code as amended in 1907, extending the liability of an employer, for an injury, "when the same results from the wrongful act, neglect or default of . . . a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that upon which the employee injured is employed," is to be given a fair and reasonable meaning, and to be liberally construed to effect the purpose of the amendment to extend the liability of the employer.

ID.—INTENTION OF LEGISLATURE—BROAD SCOPE OF LAW—SEPARATE MECHANICAL DEVICES.—From the phraseology of the amendment to section 1970 of the Civil Code, it is evident that the legislature intended to make the law broad in its scope, and to preserve the liability of the employer in all cases generally where the mechanical device upon which the injured servant is employed is separate and different from that being operated by the negligent employee.

ID.—SINGLE INTERURBAN "TROLLEY CAR" INCLUDED IN "RAILROAD TRAIN."—It is held that under a fair rule of construction, the words "railroad train," as applied to an interurban railway, whose trolley cars combine in their construction both motors for propulsion and

seats for the accommodation of passengers, is sufficient to include a single "trolley car" operated independently for the carriage of passengers. In construing statutes, courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition.

ID.—CODE SECTION NOT VIOLATIVE OF STATE OR FEDERAL CONSTITUTION—EQUAL PROTECTION OF LAWS NOT DENIED.—It is held that the amendment to the code section extending the employer's liability in specified cases is not in violation of the state or federal constitution, in giving certain citizens privileges not granted to others, or in denying to anyone the equal protection of the laws. The classification made by the statute is not arbitrary, but it comports with the rule that there must be a difference in the situation of the employee from that which exists when both are working on the same machine, which justifies the special protection being extended to one class and withheld from the other.

ID.—RULE OF PROTECTION—OPERATIVES ON DIFFERENT TRAINS OR CARS. The rule of the special protection of one class of operatives especially applies to operatives of a railroad working upon different trains or cars.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Benjamin F. Bledsoe, Judge Presiding.

The facts are stated in the opinion of the court.

Gurney E. Newlin, Roy V. Reppy, J. W. McKinley, and W. R. Millar, for Appellant.

E. B. Drake, and Jones & Drake, for Respondent.

JAMES, J.—Plaintiff on April 2, 1908, was employed as a motorman on a passenger car of defendant which was engaged in making runs between the cities of Los Angeles and Santa Monica. On the day mentioned the car upon which plaintiff was at work was proceeding west and had been given the "right of way." The conductor of another car of the same employer, which car was proceeding in the opposite direction, had been instructed by the train dispatcher to await orders at Gayland station. He disregarded these orders of the dispatcher and caused his car to proceed easterly along the track, and as a result it collided with the car upon which plaintiff was employed and caused plaintiff grave physical injuries. This action was brought to recover the sum of

\$25,950 as damages. By the answer of defendant it was admitted that the accident occurred because of the negligence of the conductor, who disregarded the orders of the dispatcher, issue being taken by the answer only on plaintiff's allegations as to the character and extent of the injuries suffered and the amount of damages sustained. The jury returned a verdict in favor of plaintiff in the sum of \$12,500, upon which judgment was entered. Defendant presented a motion for a new trial, which was denied, and an appeal was then taken from that order and also from the judgment.

In support of this appeal the first contention of defendant is that the negligence by which the accident was caused was that of a fellow-servant with plaintiff, the risk of which negligence plaintiff assumed when he entered the employment of the defendant. Under the condition of the statute (Civ. Code, sec. 1970), as it stood prior to the year 1907, there is little room for doubt but that the relation existing between a motorman and conductor working upon different cars of the same employer and on the same line of railroad would have been such as to prevent a recovery by one from the employer for damages caused by the negligence of the other. But the legislature in 1907 [Stats. 1907, p. 119] enacted an amendment to the Civil Code section, by the provisions of which the responsibility of the employer was enlarged. That section as it was then changed and as it has since provided reads, in part, as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, . . . ; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of . . . a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed. . . ." Plaintiff, under the facts of the case as they were admitted by defendant, was allowed to recover judgment because of the provision contained in the section quoted

from, which imposes liability upon an employer for injuries suffered by the employee through the negligence of a fellow-servant, where the negligent servant is "employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed." Defendant demurred to the complaint of plaintiff on the ground that by the facts alleged a cause of action was not stated, and the ruling of the court having been against defendant on that point, the same contention is raised here. More particularly stated, the objection urged is that single cars, like those upon which the plaintiff and the negligent conductor were employed, are not to be considered as machines or railroad trains, or to be comprehended within the term "other appliances" as used in the statute. To our minds, influenced by the consideration that the statute must be given a fair and reasonable meaning and be liberally construed to effect the purposes of its enactment (*Judd v. Letts*, 158 Cal. 359, [111 Pac. 12]), this contention of appellant is without merit. From the phraseology of the provision quoted it is evident that the legislature intended to make the law broad in its scope and to preserve the liability of the employer for the employee's benefit in all cases generally where the mechanical device upon which the injured servant is employed is separate and different from that being operated by the negligent employee. By way of closer definition of the department of labor classification, the legislators undertook to and have said in effect that a person is not employed in the same department with another servant where he is at work with or upon a different machine, railroad train, etc.; and in consonance with a rule of fair construction it would be proper to say, if the words "railroad train" were the only descriptive ones contained in that portion of the statute quoted, that that term as applied to an interurban railway is sufficient to include a single trolley car. Such cars combine in their construction both motors for propulsion and seats for the accommodation of passengers. Used in interurban traffic they perform the same work over long distances as does the steam-propelled train. While a train usually consists of a motor vehicle and cars attached thereto, where these adjuncts are combined in one carriage and serve the same uses, there is no good reason why the one should be said to be a train, within the meaning of the statute, and the other

not be so classed. In construing statutes courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition.

That the provision of the section gives certain citizens privileges not granted to others, or denies to any the equal protection of the laws, in violation of the provisions of the state or federal constitution, we do not believe. There is a good reason why the persons who are employed upon the same machine should be denied right of an action for damages against their employer where such damages are caused by the negligence of one of them, and that those employed upon different machines or trains should not be so restricted as to such remedy. Men working together on the same machine or car generally have an opportunity to view the actions of each other; under the eyes of each other they are easily and readily apprised of any negligent act which threatens injury to them and can better protect themselves. The classification made by the statute is not therefore arbitrary, but it comports with the rule that there must be a difference in the situation of the employee which justifies the special protection being extended to the one class and withheld from the other. Especially is this so as applied to operatives of a railroad working upon different trains or cars. (*Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, [54 L. R. A. 787, 60 N. E. 943].)

No other points are presented for consideration.

We are of opinion that the judgment and order should be affirmed, and it is so ordered.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 17, 1912.

[Civ. No. 1035. Second Appellate District.—March 19, 1912.]

OSCAR RONNING, Respondent, v. R. B. WAY, Appellant.

ACTION FOR CONVERSION OF MORTGAGED PERSONAL PROPERTY BY CONSTABLE — NOTICE BEFORE SALE — PLEADING — CAUSE OF ACTION STATED.—A complaint in an action by a mortgagee of personal property situated in Los Angeles county, and mortgaged by a resident of Riverside county, which alleges that it was recorded in Los Angeles county only, that defendant, who is a constable in a specified township in the latter county, converted said mortgaged property by levying upon and selling the same, without paying or tendering to plaintiff the amount of the debt due to plaintiff, the payment of which was secured by said mortgage, that the value of the mortgaged property so converted was the sum of \$600; and that prior to the sale and conversion of said personal property the plaintiff informed defendant of the existence of said chattel mortgage, and the claim of the plaintiff thereunder, states a cause of action, and a general demurrer thereto was properly overruled.

ID.—EFFECT OF FAILURE TO RECORD CHATTEL MORTGAGE IN MORTGAGOR'S COUNTY—QUALIFIED INVALIDITY—PLEADING REQUIRED BY DEFENDANT.—The failure of the mortgagor to record the chattel mortgage in the county of his residence, as expressly required by section 2959 of the Civil Code, when taken in connection with section 2957 thereof, renders the chattel mortgage void "as against the creditors of the mortgagor, and subsequent encumbrancers of the property in good faith for value." It is held that, as these enumerated classes do not appear to include the defendant, he is not in a position, without pleading the fact, to avail himself of the benefit thereof.

ID.—CONSTRUCTION OF CODE PROVISIONS AS TO CHATTEL MORTGAGES—MODIFICATION OF FORMER PROVISIONS.—Although the chattel mortgage in question comprised personal property not specified in section 2955 of the Civil Code as subject thereto, and although the mortgagor failed to record it in the county of his residence, as provided in sections 2957 and 2959 of the same code, yet each of those sections is qualified by the later provisions of section 2973 of the Civil Code, adopted in 1905, providing that "mortgages of personal property other than that mentioned in section 2955, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs and assigns, and personal representatives, and persons who, before parting with value, have actual notice thereof."

ID.—INSUFFICIENT DEFENSE TO ACTION FOR CONVERSION—LEVY AND SALE AGAINST VENDEE OF MORTGAGOR—BONA FIDE PURCHASE FOR VALUE

NOT ALLEGED.—An alleged defense to the complaint, in the action for conversion, that the levy and sale by the constable defendant was against a vendee of the mortgagor, as the owner of the property mortgaged, which fails to aver that such vendee was a purchaser in good faith and for value, is insufficient. Under section 2957 of the Civil Code, to render the mortgage void as against such vendee, it must appear by allegation, proof and finding that the purchase was in good faith and for value, and in the absence thereof, the position of the vendee with reference to the property is identical with that of the vendor.

ID.—SUPPORT OF FINDING AS TO NOTICE OF MORTGAGE TO DEFENDANT—ADMISSION OF VALUE OF MORTGAGED PROPERTY—FINDING NOT REQUIRED.—It is held that the evidence sufficiently supports the finding that the defendant had actual notice of the existence of plaintiff's chattel mortgage before the sale made by the defendant; and where the answer made a mere conjunctive denial that the property was of the value of \$600, such denial constituted an admission of any less sum, and must be deemed evasive, and in fact no denial at all, and no finding thereon was required.

ID.—IMMATERIAL FINDING—SALE OF "GREATER AND BEST PART OF PROPERTY"—CONVERSION—FAILURE TO REDELIVER.—It is held that a finding that the defendant took and carried away the whole of the mortgaged property, "and sold the greater and best portion thereof," is immaterial as to the latter part of the finding. The right to recover damages is based upon the conversion, and since no part of the property carried away is shown to have been redelivered, the disposal of the converted property by the officer was not material.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

Gurney E. Newlin, Roy V. Reppy, J. W. McKinley, and W. R. Millar, for Appellant.

E. B. Drake, and Jones & Drake, for Respondent.

SHAW, J.—This is an action to recover damages against the defendant as constable for an alleged wrongful conversion of property mortgaged to plaintiff.

The court gave judgment for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

The complaint alleges the execution to plaintiff of a mortgage upon certain personal property, situated at Whittier, in Los Angeles county, by one George A. Gray, a resident of Riverside county; that the mortgage was recorded in Los Angeles county *only*; that defendant on May 15, 1909, converted the mortgaged property by levying upon and selling the same without paying or tendering to plaintiff the amount of the debt due to plaintiff, payment of which was secured by said mortgage; that the value of the mortgaged property so converted by defendant was the sum of \$600. It was further alleged "that prior to the sale and conversion of the personal property herein referred to the plaintiff informed the defendant of the existence of said chattel mortgage and the claim of the plaintiff thereunder."

Appellant contends that the court erred in overruling a general demurrer interposed to the complaint. This contention is based upon the claim, first, that the property covered by the mortgage was other than that specified in section 2955, Civil Code, and therefore not subject to mortgage; and, second, that the complaint shows that at the time of the execution of the mortgage the mortgagor resided in Riverside county in this state, and that no record of the mortgage was made in said county as required by section 2959, Civil Code; that by reason of such failure to so record the mortgage it was void under the provisions of section 2957, Civil Code, which provides that "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless: . . . 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property." Under this provision, the failure to record the mortgage in Riverside county rendered it void as to two classes of persons only; that is, creditors of the mortgagor and subsequent encumbrancers and purchasers in good faith and for value. Since, however, it does not appear that defendant belonged to either of these enumerated classes, he is not in a position, without pleading the fact, to avail himself of the benefit thereof. (*Cardenas v. Miller*, 108 Cal. 250, [49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472].) Moreover, the provisions of all these sections relied upon by appellant are qualified by section 2973, Civil Code, adopted in 1905. (*Old*

Settlers Investment Co. v. White, 158 Cal. 237, [110 Pac. 922].) This section provides: "Mortgages of personal property, other than that mentioned in section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees, and personal representatives, and persons who, before parting with value, have actual notice thereof." As it was alleged in the complaint that prior to the conversion of the property by defendant he had actual notice of the existence of the mortgage, it was, under the provisions of the section just quoted, as to him, a valid existing mortgage, notwithstanding the fact that it contained property other than that mentioned in section 2955, Civil Code, and failure to record the same in the county of the mortgagor's residence. The complaint was not obnoxious to the general demurrer interposed.

In his answer defendant averred that at the time of the alleged conversion one E. Jennie Horton was the owner and in possession of the goods and chattels as a purchaser thereof from Gray, the mortgagor; that in an action wherein Horton was sued by a creditor in the justice's court of Los Nietos township, of which defendant was constable, a writ of attachment was issued to him as such officer, pursuant to which he levied upon the mortgaged property, and thereafter, under an execution issued upon a judgment rendered in said action, he as constable sold the property to satisfy the judgment so rendered against Horton, all of which was by the court found to be true. It is not shown that Horton, prior to the purchase, had actual notice of the mortgage, and in the absence of such notice appellant, upon the grounds alleged in support of his demurrer, insists that the mortgage was void as to Horton, she being a subsequent purchaser from the mortgagor; that as her right to the property was unaffected by the mortgage, the creditor's right to enforce his debt against the same was not affected by notice given to the constable acting as his agent. Under the provisions of section 2957, Civil Code, to render the mortgage void as against Horton it must appear by allegation, proof and finding, not only that she was a purchaser, all of which *does appear*, but that such purchase was made in *good faith and for value*, neither of which facts is alleged, proven or found. In the absence of such showing, no basis exists by virtue of said section 2957 for the claim that

the mortgage was void as against her. Her position with reference to the property was identical with that of her vendor. (*Bank v. Purdy*, 130 Cal. 455, [62 Pac. 738]; *Bank v. Menke*, 128 Cal. 103, [60 Pac. 675].)

The only material allegation in the complaint which is denied by the answer is that prior to the conversion defendant had actual notice of the existence of the mortgage. Upon this issue the court found in favor of plaintiff. Appellant attacks this finding, claiming it is not supported by the evidence. The evidence of defendant is that while he was posting notices of the levy of attachment, the wife of the plaintiff came to the building wherein the property was located and had some conversation with Mr. Moore, the attorney for the plaintiff in the action wherein the attachment was issued; that he did not hear her say anything with regard to an existing mortgage upon the property. With reference to the circumstance of this visit, Mrs. Ronning, the wife of plaintiff, testified that Mr. Moore, to whom she stated in the presence and hearing of the defendant that "we have a mortgage on the outfit," introduced her to defendant, saying, "Here is the woman that has a mortgage on the outfit"; that she replied, "I don't pretend to have it; we have it." Mr. Moore said, "How do you know the mortgage is good?" to which Mrs. Ronning replied, "We supposed it was good." Under this evidence, it cannot be said the finding complained of is lacking support in the evidence. (*Meherin v. Oaks*, 67 Cal. 57, [7 Pac. 47].)

Appellant claims the finding of the court to the effect that the mortgaged property was of the value of \$600, as alleged in the complaint, is without evidentiary support. The answer merely denied the property was of the value of \$600. Such denial was wholly consistent with an alleged value of \$599. (*Westbay v. Gray*, 116 Cal. 660, [48 Pac. 800].) Such denial, as said in *Marsters v. Lash*, 61 Cal. 623, is "evasive and in fact no denial at all." There being no actual denial of the allegation, no finding thereon was required; hence, it is immaterial that no sufficient evidence was adduced in support thereof.

Appellant directs our attention to a number of other assignments of error predicated upon insufficiency of evidence to support findings, all of which, as he says, are based upon the invalidity of the mortgage. What we have said in dis-

cussing the court's ruling upon the general demurrer is a sufficient answer to appellant's contention in this regard.

Appellant challenges the finding to the effect that defendant seized, took and carried away the whole of said mortgaged property "and sold the greater and best portion thereof"; his contention being that the evidence fails to show a sale of the greater and best part thereof. Plaintiff's right to recover damages is based upon the conversion. The disposal of the converted property by the officer, since it was not shown to have been redelivered to the mortgagee, as done in *Irwin v. McDowell*, 91 Cal. 119, [27 Pac. 601], was wholly immaterial.

We find no merit in alleged errors due to rulings of the court upon admissions of evidence. In several instances of alleged error no objection was made by defendant to the ruling of the court, and, hence, appellant is not in a position to urge the same in this court.

The judgment and order are affirmed.

Allen, P. J., and James, J., concurred.

[Civ. No. 1083. Second Appellate District.—March 21, 1912.]

EDWARD G. EDMUNDS, Respondent, v. SOUTHERN PACIFIC COMPANY, a Corporation, Appellant.

NEGLIGENCE—STEAM SCALDING OF RAILWAY MAIL CLERK—PERMANENT DISABILITY—SETTLEMENT AND RELEASE—DECEIT—RESCISSON—QUESTION FOR JURY.—In an action to recover damages for permanent disability to plaintiff, as a railway mail clerk, by scalding from steam, through defendant's negligence, where it appears that defendant's claim agent took advantage of his weak condition to secure a settlement and release of liability for \$1,250, by deceitfully representing that he would be well in two or three weeks and would have no scars, and such settlement and release were pleaded in bar of the suit, it is held that such deceit amounted to actual fraud under section 1572 of the Civil Code; and where plaintiff before suit rescinded the same, and tendered back the money, it is held a question for the jury whether or not, at the time of the settlement, the plaintiff was so weak mentally that he did not understand what he was doing.

ID.—SUPPORT OF VERDICT—CONCLUSIVENESS UPON APPEAL.—A verdict for the plaintiff in the sum of \$5,000 is held to be amply supported

by the evidence in the case; and as it is not the province of the appellate court to review or weigh the evidence, and as the instructions were as favorable to the defendant as could be asked, the verdict must be deemed a final determination in the plaintiff's favor of all the issues in the case, and adversely to the settlement and release pleaded in the defendant's answer.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

J. W. McKinley, and W. R. Millar, for Appellant.

E. B. Drake, for Respondent.

ALLEN, P. J.—The action was one for damages occasioned by injuries to plaintiff through the negligence of defendant. There is evidence in the record tending to show these facts: Plaintiff, a mail clerk employed by the United States government, was injured in an accident on defendant's road. The car in which he was employed being thrown near the engine, escaping steam from the engine burned plaintiff to such an extent that the skin and flesh fell from his hands, and his hands were so injured that it was not possible to close them in a natural way. In addition to this, his face, ears and ankles were burned so as to make a permanent discoloration of the skin, and he was bruised on his knees and one of his ribs injured. Plaintiff was so shocked nervously that he was unable to sleep, and within three weeks after the accident had lost over forty pounds in weight. Through the result of the injury he was rendered unable to perform his usual and ordinary work; his hands are permanently disfigured, and up to the time of the trial his sleep was disturbed, and he is probably so permanently injured as to render him unable to follow his usual avocation. After the injury plaintiff was taken to a hospital belonging to defendant and kept there for about eighteen days, when he was brought to the city of Los Angeles, at which place he arrived on the 7th of January, 1909. When he arrived at Los Angeles he was irrational. Occasionally he would have lucid intervals of five minutes or more, but much of the time, as one witness expressed it, "he just acted like a man that was crazy, that is all I can

tell." While he was in this condition physically and mentally, and within four days after his arrival at Los Angeles, a claim agent of defendant approached him and effected a settlement of his claim for damages and paid him \$1,250. Plaintiff testified that when he signed the settlement and release he did not know what he was doing; that he did not know its contents, and did not know such contents until the 11th of February, 1910, at which date, through counsel, a notice of rescission of the release was served upon defendant, with a tender of the amount paid. There is evidence to the effect that the claim agent represented to plaintiff that he would be able to work in two or three weeks, and that he would be all right in two or three weeks and would have no scars. Defendant upon the trial pleaded this settlement and release in bar of the action; admitted its negligence, but denied that plaintiff was damaged to the amount claimed. The action was tried by a jury, which returned a verdict in plaintiff's favor of \$5,000. Judgment was rendered thereon for that amount, from which judgment, and from an order denying a new trial, defendant appeals.

Appellant's principal contention is that no actual fraud was shown in the matter of the settlement, and that it does not appear that plaintiff was in such mental condition at the time of the settlement as to render him incompetent to act; and, further, that the amount paid was equal to the damages sustained. The jury having before it the witnesses, and having heard all of the evidence in the case, determined these matters adversely to appellant, and there being testimony in the record ample to sustain such verdict, it is not the province of an appellate court to review or weigh the evidence in a determination as to its weight or character. The suggestions of the claim agent and his statements to a man in the weak physical condition of plaintiff were acts fitted to deceive, and under section 1572, Civil Code, amounted to actual fraud. In addition to this, a careful perusal of the transcript leaves little room for doubt that this man upon the date of this attempted settlement was unfitted to enter into or consummate any business deal or arrangement. His mental and physical condition were such that it cannot be said that two minds met in the contract of release, and the jury very properly so determined. The question of sanity or insanity in the abstract is not involved in matters of this kind. The question for the jury was

whether or not at the time of the settlement plaintiff was so weak mentally and physically that he did not know and understand what he was doing. The court gave instructions to the jury as favorable to defendant as could be asked, and under these instructions the verdict of the jury must be accepted as a final determination of the matters at issue. The suggestion of counsel that the amount of the settlement was adequate as compensating plaintiff on account of his injuries, merits no serious consideration.

We find no error in the record, and the judgment and order are affirmed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 20, 1912.

[Civ. No. 956. First Appellate District.—March 22, 1912.]

MORRIS A. GRIESEMER, Respondent, v. WILLIAM HAMMOND and WILLIAM HAMMOND, Jr., Doing Business Under the Name and Style of HAMMOND & HAMMOND, F. S. KELLY and JOSIE KELLY, His Wife, Appellants.

CONTRACT TO SELL LAND—MUTUAL AND DEPENDENT COVENANTS—OBJECTIONS TO TITLE—RECOVERY OF DEPOSIT—FULL TENDER OF PERFORMANCE ESSENTIAL—GOOD TITLE TENDERED.—Where, under a contract for the sale and purchase of land, the covenants of the contracting parties were mutual and dependent, and each party was bound to a full performance of the contract at the same time, and ten per cent of the cash price of \$13,500 was deposited to secure the sale, and the remainder of \$6,000 cash was to be paid, and \$7,500 secured upon the making of a good title, and if a good title could not be made, the deposit was to be returned, or forfeited, if the vendor was ready to perform, and the purchaser refused to perform, and the purchaser objected to defects in the title, which were met within the life of the contract, by the tender of a good title, the purchaser cannot sue to recover the deposit without tendering full performance on his part, and he is bound to accept the good title offered, and to pay for and secure payment as agreed.

Id.—GENERAL RULE AS BETWEEN VENDOR AND PURCHASER—OUTSTANDING DEED OF TRUST—RECONVEYANCE FROM TRUSTEES.—The general rule, as between vendor and purchaser, is that the purchaser cannot sue to recover purchase money paid until after he has made a tender of the purchase money due under the contract and demanded a deed. The fact that, in the present case, there was a deed of trust outstanding did not excuse plaintiff from the necessity of making a tender of the purchase money in order to recover his deposit, especially where the vendor was in readiness to remedy the defect by a reconveyance from the trustees to the purchaser. The vendor had the right to rely upon the purchase money to liquidate the debt secured by the deed of trust.

Id.—NATURE OF DEED OF TRUST TO SECURE DEBT—MORTGAGE.—A deed of trust given as security for the repayment of money is, under the circumstances of this case, regarded as a mortgage. Under the facts, there was no unremovable defect in the title to the property involved in the controversy, and it is sufficient that the vendor through one of his agents tendered to the plaintiff a perfect title to the property.

Id.—DUTY OF VENDEE TO INQUIRE AS TO TAXES PAID OR EXISTENCE OF ANY ENCUMBRANCE.—Where the taxes were in fact paid, although the vendee was not informed thereof, it was his duty to inquire as to the condition of the record, and as to whether there were any unpaid taxes or other encumbrance.

Id.—RECORDER'S FEE FOR RECONVEYANCE NOT TENDERED—WAIVER OF OBJECTION.—The fact that the recorder's fee for recording the reconveyance was not tendered does not affect the validity of the tender of the reconveyance, especially where if it had been demanded it would doubtless have been paid, and, under the circumstances, such objection was waived by the failure of the plaintiff to object to the reconveyance by the trustees on that ground.

Id.—FINDINGS FOR PLAINTIFF UNSUSTAINED.—It is held that the findings for the plaintiff are unsustained by the evidence.

APPEAL from an order of the Superior Court of Alameda County denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

Cary Howard, Henry G. Tardy, and Wm. C. Clark, for Appellants.

Edward Hohfeld, for Respondent.

KERRIGAN, J.—This is an appeal from an order denying defendants' motion for a new trial in an action to recover

money paid as a deposit on a contract for the purchase of land.

On the twenty-fourth day of October, 1907, Hammond & Hammond, copartners, as agents of the defendant, F. S. Kelly, entered into a contract with the plaintiff, whereby the latter was to purchase a certain parcel of land situated in Alameda county and pay therefor the sum of \$13,500. At the time of the execution of the contract the plaintiff paid said agents the sum of \$1,350 on account of and as a deposit to secure the sale of said land. The terms of sale were as follows: "Cash \$6,000, balance flat loan of \$7,500 at seven per cent net . . . 60 days are to be allowed for legal search of title. If it is not found good, the deposit . . . is to be returned; if the title is found good and the sale is not consummated in accordance with the above terms, the deposit is to be forfeited."

The time allowed to plaintiff for examining title was extended by mutual consent up to January 29, 1908.

The contract did not call for the furnishing of an abstract of title or certificate of search. The uncontradicted testimony, however, of Mr. Hammond, Jr., shows that he procured a certificate of title for the plaintiff without authority from the vendor, and that he expected payment therefor to be made by the plaintiff.

At about the end of the sixty days prescribed in the contract Mr. Hammond, Jr., delivered to the plaintiff a deed of trust and two promissory notes aggregating \$7,500 (representing the "flat loan" figuring in the purchase price) for execution by plaintiff, and at the same time presented plaintiff with the certificate of title, which showed a tax lien and the existence of a deed of trust on the property securing the repayment to the Citizens' Bank of Alameda of a loan of \$5,000. Plaintiff took the abstract, deed and notes, and submitted them to his attorney for examination. As a result of the report on the title by said attorney, the plaintiff, on January 27, 1908, wrote Messrs. Hammond & Hammond a letter, wherein, after referring to the terms of the contract, he said: "I have to report to you that the title has been examined and found defective and not good in this, that the legal title to the property is vested in S. E. Biddle, Jr., and Frank V. Bordwell, as security for the payment of \$5,000, and the property is subject to the lien of taxes, state, county and municipal." In this letter to the agents plaintiff also complained

that the notes and the deed of trust did not correctly embrace the terms of their oral agreement as to the time of payment of the balance of the purchase price, and the letter concluded with a demand for the return of the deposit.

Two days after receiving this letter, January 29, 1908, and within the life of the contract as extended, Mr. Hammond, Jr., called upon the plaintiff, and tendered him (1) a deed to the property from the vendor, F. S. Kelly, and Josie Kelly, his wife; (2) a deed of reconveyance thereof from Messrs. Biddle and Bordwell, as trustees, to said F. S. Kelly and wife; (3) a note for \$7,500, and (4) a deed of trust to said property to secure said note, demanding that plaintiff execute said note and deed of trust. At the time of this tender Mr. Hammond, Jr., demanded payment of the balance of the purchase price payable in cash, to wit, \$4,650.

The nature of these documents was explained to the plaintiff; and while he made no specific objection of any kind to them, still he declined to examine or accept them, and told Mr. Hammond that he would present the whole matter to his attorney.

It was admitted at the trial that the taxes mentioned in the letter of January 27th were paid on January 20th, although the record fails to show that plaintiff was informed of this fact. It was also uncontradicted that the cost of recording the deed of reconveyance from Messrs. Biddle and Bordwell, trustees, was not tendered to plaintiff.

The evidence in the case also shows that said deed of reconveyance was intrusted to Mr. Hammond, Jr., by Messrs. Biddle and Bordwell, trustees, to be delivered only upon the payment to him for their account of the \$5,000 for which it was security.

The plaintiff made at no time a tender of the money to be paid by him, or in any other manner offered to comply with the terms of the agreement, or otherwise placed the vendor in default. He contradicted the testimony introduced by the defendants to the effect that he had stated that he could not spare from his business the money necessary to carry out the transaction, and that for this reason did not want to do so.

The covenants in this contract are mutual and dependent; and before the plaintiff could rescind the contract and recover the amount of his deposit he must have paid or offered to pay the unpaid portion of the purchase price due thereunder. In

such a contract the rule is plain that the vendor must be given an opportunity to perform his part of the contract before he can be put in default and an action maintained against him to recover back the purchase money. (Maupin on Marketable Title, 200, 792; *Hooe v. O'Callaghan*, 10 Cal. App. 567, [103 Pac. 175].) And the general rule is that a vendee cannot recover purchase money paid on his contract to purchase until after he has made a tender of the purchase money due under the contract and demanded a deed. (*Hanson v. Fox*, 155 Cal. 106, [132 Am. St. Rep. 72, 20 L. R. A., N. S., 338, 99 Pac. 489]; *Easton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280]; *Newton v. Hull*, 90 Cal. 487, [27 Pac. 429]; *Townsend v. Tufts*, 95 Cal. 257, [29 Am. St. Rep. 107, 30 Pac. 528]; *North Stockton etc. Co. v. Fisher*, 138 Cal. 100, [70 Pac. 1082, 71 Pac. 438]; *Leach v. Rowley*, 138 Cal. 709, [72 Pac. 403]; *Englander v. Rogers*, 41 Cal. 420; *Poheim v. Meyers*, 9 Cal. App. 31, [98 Pac. 65].)

This rule was also announced in *Peckham v. Stewart*, 97 Cal. 147, [31 Pac. 928], the court saying: "The plaintiffs were not, under the contract set out in the complaint, entitled to a conveyance of the lots described in the agreement until they first paid, or offered to pay, defendant the balance of the purchase price agreed upon; and unless the complaint alleges a full performance or offer to perform their part of the contract in this respect, they are not entitled to maintain this action."

The fact that there was a deed of trust outstanding did not excuse plaintiff from the necessity of making a tender of the purchase money in order to recover his deposit. (*Ziehen v. Smith*, 148 N. Y. 558, [42 N. E. 1080]; *Campbell v. Prague*, 6 App. Div. 554, [39 N. Y. Supp. 558].)

The case of *Higgins v. Eagleton*, 155 N. Y. 466, [50 N. E. 287], is decisive of the case at bar. There under the contract the payment of the unpaid consideration and the transfer of title were dependent and concurrent acts; and the court, after stating that the vendee, in order to put the vendor in default, must have tendered a performance on his part and demanded a performance by the vendor, said [referring to a mortgage on the premises]: "The agreement was not broken by the fact that there was a mortgage upon the property. . . . The mere existence . . . of an encumbrance on the property, which it was within the power of the vendor to remove within

the time fixed for performance, did not constitute a breach of the contract on his part." Referring to the case of *Ziehen v. Smith*, 148 N. Y. 558, [42 N. E. 1080], the court, continuing, said: "The decision of this court in *Ziehen v. Smith* seems to be decisive of this question. It was there held that the mere fact that at the time fixed for the concurrent and mutual performance of an executory contract for the conveyance of real estate there existed a lien or encumbrance upon the property which it was within the power of the vendor to remove, did not relieve the vendee from making a tender and demand of performance as a condition precedent to the maintenance of an action to recover the money paid on the contract, or for damages as for its breach on the part of the vendor." (See, also, *Easton v. Montgomery*, 90 Cal. 307, [25 Am. St. Rep. 123, 27 Pac. 280]; *Raben v. Risnikoff*, 95 App. Div. 68, [88 N. Y. Supp. 470].)

A deed of trust given as security for the repayment of money is, under the circumstances of this case, regarded as a mortgage. (*Weber v. McCleverty*, 149 Cal. 316, [86 Pac. 706].)

There was no unremovable defect in the title to the property involved in this controversy, nor had the vendor indicated in any manner that he would not comply with the terms of the contract. Therefore, under the authorities cited, if the plaintiff desired to consummate the contract, or to recover back his deposit, he should have made a tender of the balance of the purchase price and demanded a performance by the vendor.

The vendor, through one of his agents, tendered the plaintiff a perfect title to the property, and for this additional reason the plaintiff is not entitled to the return of his deposit. Plaintiff asserts that he was not tendered a merchantable title because (1) the taxes for the current fiscal year had not been paid, and (2) the vendor did not tender him a deed to the property free from encumbrance.

As to the taxes, it appears that they were paid a week prior to the time when plaintiff wrote his letter rejecting the title, and nine days before the tender by the vendor. The contract did not require the vendor to furnish an abstract, nor did he at any time subsequent to the making of the contract directly or through his agents obligate himself to furnish a certificate of title, and consequently it was the duty of the vendee him-

self to learn the condition of the record. (*Easton v. Montgomery*, 90 Cal. 313, [25 Am. St. Rep. 123, 27 Pac. 280].)

As to the fact that the record showed the property to be encumbered with a deed of trust in favor of Biddle and Bordwell, we are of the opinion that this defect was remedied by the tender to the plaintiff by the vendor's agents of the reconveyance by said trustees. This reconveyance was properly drawn and acknowledged, and it was handed to the vendor's agents with the understanding that upon repayment of the amount of the loan they were to take the necessary steps to release the property from the encumbrance. The vendor had a right to rely on the purchase money to liquidate the indebtedness secured by the deed of trust. (*Webster v. Kings Co. Trust Co.*, 80 Hun, 420, [30 N. Y. Supp. 357]; *Ziehen v. Smith*, 148 N. Y. 558, [42 N. E. 1080].) The \$4,650 due at the time of the tender, and the \$1,350 already in the hands of the vendor's agents, were more than sufficient for this purpose.

Plaintiff also objects that the amount of the recorder's fee for recording the reconveyance from Biddle and Bordwell, trustees, not having been offered to him, the tender of the vendor was insufficient. No such objection to the tender was made at the time the deed was presented. Obviously the vendee, for some reason not consonant with good faith, was trying to avoid performance of the contract. On the other hand, the vendor was doing promptly everything reasonable to complete the transaction, and if this objection had been raised, no doubt the vendor would have gladly defrayed the expense in question. (*Dwork v. Weinberg*, 120 App. Div. 508, [105 N. Y. Supp. 504].) The mere possibility that he would have failed to do so would not authorize the plaintiff to cancel the contract on the ground that the vendor had failed to perform. (*Teller v. Schulz*, 123 App. Div. 883, [108 N. Y. Supp. 325]; *Maupin on Marketable Titles*, 2d ed., 707.) Moreover, the plaintiff, not having raised this objection at the time, is deemed to have waived it.

One other objection made by plaintiff remains to be noticed. In his letter of January 27th he objected to proceed with the contract for the reason that the deed of trust, to be given by him as security for the last payment of \$7,500, empowered the trustees to realize on the security in a shorter time than was agreed upon in his conversation with the vendor's agent

at the time of the making of the contract. This ground of objection appears to have been abandoned by the plaintiff, and we think properly so for a number of reasons, and particularly in view of the uncontradicted evidence in the case that on the occasion of the tender of the 29th of January the agent of the vendor informed the plaintiff "that if the note and deed of trust were not to his liking, he could have them drawn any way he saw fit within reason."

Under the circumstances of this case, with the taxes all paid, with the offer of the vendor to release the deed of trust, and to give the plaintiff all the time to pay the balance of the purchase price that he might reasonably desire, we do not hesitate to hold that the plaintiff is not in a position to insist upon a rescission of the contract and to recover his deposit.

We conclude that the finding of the court that the intent and purpose of the agreement of sale was that plaintiff should rely upon the abstract to determine the nature and state of the title to the property is not supported by the evidence in the case. Neither does the evidence sustain the finding that the vendor failed to make a tender of a good title, nor the view that the plaintiff was not required to make a tender of the balance of the purchase price under the contract.

The order denying defendant's motion for a new trial is reversed.

Hall, J., and Lennon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 21, 1912.

[Crim. No. 167. Third Appellate District.—March 25, 1912.]

THE PEOPLE, Respondent, v. THOMAS P. HAYDON,
Appellant.

CRIMINAL LAW—MURDER—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—INCONSISTENCIES OF WITNESS TO CRIME.—Where, upon a prosecution for murder, the verdict was evidently based mainly upon the evidence of the brother of the deceased, as an eye-witness of the crime, it is held that, notwithstanding inconsistencies in his statement as to matters of detail, it cannot be said that there was anything in his testimony as to the homicide from which the reviewing court could justly conclude that his entire testimony is *per se* unbelievable, and could not, if accepted in the main by the jury, warrant their verdict as against the defendant's story of self-defense.

ID.—TEST OF INCREDIBLE TESTIMONY.—Testimony, in order to bear upon its face such improbability as to render it unbelievable, must involve a claim that something has been done that it would not seem possible could be done, under the circumstances described, or involve conduct that no sane person would be likely to do.

ID.—PROVINCE OF APPELLATE COURT AND OF JURY.—Appellate courts are not authorized to review the evidence, except when, upon its face, it may be justly held that it is insufficient to support the ultimate issue involved, in which case it is not an issue of fact, but purely one of law. Such courts are in no position to determine the credit of witnesses, or to weigh their testimony, which is the sole province of the jury in a criminal case. In the present case, the jury were authorized, in the discharge of their duty, to accept the testimony of the brother of deceased as to the facts of the homicide, however weak it may be in other respects, and to reject any evidence contrary to his testimony as to such facts.

ID.—INAPPLICABILITY OF AMENDMENT OF CONSTITUTION TO REVIEW OF CONFLICTING EVIDENCE.—The recent amendment of the state constitution by adding section 4½ of article III thereof (Stats. 1911, pt. II, p. 1778), prohibiting reversals in criminal cases for error, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," is inapplicable where no error appears in the case upon any question of law, and the verdict is sustained upon conflicting evidence.

ID.—CONSTRUCTION OF AMENDMENT—PROVISION OF CONSTITUTION LIMITING APPELLATE COURTS TO "QUESTIONS OF LAW" UNAFFECTED.—The appellate court deems it certain that "said amendment was not intended to change, nor has it changed, the very sensible rule pre-

scribed by the constitution, and for so many years adhered to in this state, that, in the exercise of their appellate jurisdiction, the appellate courts are restricted to the consideration of questions of law alone, and that therefore, as before stated, the matter of evidence does not constitute a subject of review by those tribunals except where there necessarily arises from the evidence, or is presented thereby, from its very nature, a question of law.

ID.—COMMENT BY SUPREME COURT IN ORDER DENYING REHEARING.—In the order of the supreme court denying a rehearing, in this case, that court commented thus on the foregoing statement of law: "This court regards this statement as wholly unnecessary to the decision of the case. The denial of the petition for a rehearing is not to be construed as an indication of approval or disapproval of said statement by the supreme court."

ID.—EVIDENCE—POSTAL CARD AS TO STRAYING CATTLE.—It is held that there was no error prejudicial to the defendant in the admission in evidence of a postal card received by the father of deceased from the owner of an adjoining range as to the whereabouts of his cattle, and on which the father, addressing his sons, had written a request that if they saw the writer, to "thank him for telling us."

ID.—CROSS-EXAMINATION OF BROTHER OF DECEASED—WOUND RECEIVED—RELATIVE POSITION—ERROR WITHOUT PREJUDICE.—It was error to reject a question asked on cross-examination of the brother of deceased as to whether his position was not on the left-hand side of defendant when he received two wounds in his right arm, for the purpose of making it appear that the shots were accidental, when he was firing at deceased, merely on the ground that the question was "purely argumentative"; but it is held that, in view of other evidence, the error was wholly without prejudice.

ID.—ADMISSION OF BLOODY GARMENTS OF DECEASED—CORROBORATION OF WITNESS FOR PROSECUTION—INTENTION OF MORTAL WOUND.—The court did not err in admitting in evidence for the prosecution the bloody over and under shirts worn by deceased at the time of the fatal shot, as part of the case for the prosecution, in corroboration of the evidence of the brother of deceased as to the homicide, and to show that the shot fired by defendant took effect in a vital part of the body, as indicated by the garments, and the intention of defendant to inflict a mortal wound.

ID.—SUSTAINING BURDEN OF PROOF—PEOPLE NOT REQUIRED TO ANTICIPATE POSITIONS OF DEFENDANT.—The people, in the maintenance of the burden upon them of proving the guilt of the defendant, are not bound to anticipate the contentions or concessions, if any, which the defendant intends to make, or to assume that certain matters or theories supporting the hypothesis of guilt will not be disputed by defendant.

ID.—ABSENCE OF DEFENDANT FROM CORONER'S INQUEST—EVIDENCE NOT PREJUDICIAL.—It was not prejudicial to the defendant for the prose-

cution to prove that he was not present at the coroner's inquest held at the scene of the homicide, as there could be no implied concession on his part of guilt, in such case, as there might be if he were present and silent thereat.

ID.—BAD REPUTATION OF DECEASED FOR PEACE AND QUIET—PROPER CROSS-EXAMINATION—LOCAL FACTIONAL DISPUTE.—Where evidence was introduced to show that the reputation of the deceased for peace and quiet in the community where his family resided was bad, it was proper to allow the district attorney to ask, on cross-examination, whether such reputation was not owing to a local factional fight on the liquor question, not involving any other question, although the deceased is not shown to have belonged to one of those factions.

ID.—CROSS-EXAMINATION OF WITNESS FOR DEFENDANT—INTOXICATION DURING TRIAL.—It may be shown from the cross-examination of a witness for the defendant that he was, during practically all of the time of the trial, under the influence of intoxicating liquors, as bearing upon the witness' memory or want of memory as to the testimony given by him, where the cross-examination showed justification for the inquiry.

ID.—EVIDENCE OF GOOD CHARACTER OF DECEASED FOR PEACE AND QUIET—IMPROPER CROSS-EXAMINATION—ASSAULT UPON HONESTY AND INTEGRITY.—Where a witness had testified to the general good reputation of the deceased for peace and quiet, in a place where he lived for three years, it was not admissible to inquire on cross-examination as to incidents affecting his honesty and integrity. Such inquiry was not relevant for any purpose. The true rule as to character evidence, in a criminal case, is that it should be confined to the trait of character in issue, and should bear some analogy and reference to the nature of the charge.

ID.—UNFRIENDLINESS OF WITNESS FOR DEFENDANT TOWARD FAMILY OF DECEASED—CROSS-EXAMINATION AS TO ENMITY—IMPEACHING EVIDENCE.—Where defendant admitted unfriendliness toward the family of the deceased, but denied positive hostility, on cross-examination the prosecution had the right to lay the foundation for impeaching evidence that he was so hostile to them that he had stated that he had leased land to the defendant in order that he might kill the sons if they drove his horses off of the range. The fact that such impeaching evidence had a far-reaching effect against the witness is not a ground upon which impeaching evidence may be excluded, the only remedy being to have its effect limited by an instruction.

ID.—ABSENCE OF PREJUDICIAL ERROR IN RULINGS OF COURT.—It is held that no prejudicial error appears in the rulings of the court upon the admission or exclusion of evidence, and that no ground appears in the record for a reversal of the judgment and order appealed from.

APPEAL from a judgment of the Superior Court of Trinity County, and from an order denying a new trial. James W. Bartlett, Judge.

The facts are stated in the opinion of the court.

Bush & Hall, and C. William White, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, Deputy Attorney General, for Respondent.

HART, J.—There are, generally speaking, but two points upon which reliance is based for a reversal of the judgment and order, from which the defendant, convicted of murder of the second degree, prosecutes the appeal to this court, viz.: 1. That the evidence does not justify and support the verdict; 2. That the court committed a series of serious and prejudicial errors in the allowance and disallowance of answers to certain questions propounded to the witnesses.

The defendant was prosecuted for the crime of murder on an information, filed in the superior court in and for the county of Trinity, by the district attorney of said county, it being therein alleged that he unlawfully and with malice aforethought destroyed the life of one Morris H. Norgard.

The only witness to the homicide, other than the defendant himself, was a brother of the deceased, Cervera Norgard, a lad of a little less than thirteen years of age at the time of the homicide. His, therefore, was the only direct testimony received on behalf of the people. The circumstances of the killing as detailed by him do not accord, as might naturally be expected, with the circumstances of the homicide as related by the defendant, and thus there arises a sharp conflict in the evidence bearing upon the circumstances under which the act of killing was committed. But counsel for the appellant, with full appreciation of the rule which admittedly has always heretofore applied, and which we think still applies where a verdict is challenged for insufficiency of evidence to sustain it and there exists a substantial conflict in such evidence, contend, nevertheless, that the testimony of young Norgard is, upon its face, so plainly improbable or unbelievable that this court, which, so it is asserted, must, of necessity, thus view the boy's version of the homicide and its

attendant circumstances, is compelled to say that there is in fact no evidence worthy of belief which is in any measure contradictory to the defendant's story of self-defense, and that, therefore, the result reached by the jury is wholly without substantial support.

1. The homicide occurred on the twenty-first day of December, 1910, in a region of Trinity county known as Long Ridge.

The deceased, at the time of his tragic death, was about twenty years of age and was the son of Chris. Norgard, who, with his family, resided at Covelo, in Mendocino county. The latter was, however, the owner of a stock range, adjoining that of the defendant, in Trinity county.

The defendant, about one month previously to the day on which the killing occurred, purchased from one John D. Wathen the latter's stock range. Shortly thereafter the defendant drove his band of horses to the Wathen range and, with his family, took up his residence on said place. At about the same time, the defendant, with one J. S. Rorobough, entered into an agreement whereby the first named was permitted to graze his stock on the latter's range, comprising a large area of land situated in the neighborhood of the Norgard range, and which said land he (defendant) was making preparations to buy under his said agreement with Rorobough.

Upon the Norgard range was a cabin, situated about two miles from the Wathen place, and in which the Norgard boys lived when engaged in looking after and caring for their father's stock grazing upon the latter's range.

It appears that a feeling of intense hostility had developed between the Norgards and John D. Wathen, who sold, as seen, his range to the defendant. Wathen had married the daughter of Chris. Norgard against the latter's wishes, and, while this fact was the ostensible genesis of the ill-feeling between them, it was the theory of the defense that the real motive for the hostility of the Norgards against Wathen was to so annoy and pester the latter as to inspire in him a desire to leave that region of country and thus, hoped the Norgards, they would be able to secure the ownership of the Wathen range, which they had for a long time coveted, for a price much below its actual value. The Norgards, so the defendant contends, therefore, kept up a persistent persecution of the Wathens

by various trespasses and other annoyances up to the time that the latter sold their range to the defendant. Actuated by a similar motive, so the theory of the defense proceeded, the Norgards, after the sale of the Wathen range to the defendant, transferred their ill-will and persecution to the latter and prosecuted a systematic and relentless harassment of the defendant (by running and stampeding his horses whenever they came across them) up to the day of the homicide.

The evidence discloses that, up to approximately a month prior to the death of the deceased, the latter had been engaged in some employment in Shasta county. His father, however, having requested him to return home and assist in looking after his stock on the Trinity county range, the deceased returned to Covelo, taking with him a new automatic "five-shot" rifle. A few days thereafter the deceased went to his father's range and with his brother, Elmer, there took charge of affairs and remained until the day of the homicide.

Cervera Norgard, the day before the homicide, went to the range, taking with him for his brothers and from his father a message, calling attention to the whereabouts of certain cattle belonging to the Norgards which had strayed from their range, information as to the whereabouts of said cattle having been communicated to Chris. Norgard by a neighboring land owner through a postal card.

As to the circumstances immediately leading to and ending in the homicide, Cervera Norgard testified, in substance, as follows: That, on the afternoon of the day of the homicide, he and the deceased mounted their horses and started out over the range to look after their cattle. The deceased carried the automatic rifle referred to in a scabbard attached to his saddle. After traveling about the range for some time, and just before sundown, they came across the horses of the defendant, grazing on their range. They at once proceeded to drive the horses off the range in the direction of the Wathen place. They had not gone far when they were fired upon by Haydon, who had suddenly and unexpectedly made his appearance "across the gulch," at a distance of about one hundred yards from the boys. Haydon fired twice at the boys at this time, but without effect. The witness declared that neither his brother nor himself paid any attention to this circumstance, neither accelerating their speed

by reason of the shooting, nor making any preparation to defend themselves, but proceeded, indifferently and leisurely, with the driving of the horses toward the Wathen place. The only comment upon the shooting at this time was made by the deceased, who remarked to the witness, "they [meaning the bullets] came close."

The witness said that they drove the horses "up the hill" to a trail leading to the Wathen range. After traveling over said trail for a short distance they came to a "flat," where they "let the horses go" and themselves started across the flat. They had proceeded only a very short distance when they again saw Haydon, this time standing behind a pine tree, with his gun in his hand. The deceased was riding ahead of the witness and, as they approached the pine tree, Haydon stepped out and called either the witness or his brother "a black s——n of a b——h." Haydon used some other bad language which the witness could not recall. However, neither of the boys made any reply to the defendant and started on in the direction of a pasture on their father's range, some two or three hundred yards from the pine tree mentioned. Haydon, although holding his gun in his hands, made no effort to use it at the pine tree. While the boys proceeded toward the pasture referred to, Haydon walked out to the edge of the flat, still holding his gun and watching the young men. After looking over the pasture from the hillside to which they had gone from the flat, the boys turned their horses and retraced their steps toward the flat and in the direction of the point at which the defendant was standing. When they had reached a point about fifty yards from the point on the hill from which they had viewed the pasture, the deceased removed his rifle from its scabbard and delivered it over to Cervera, saying: "Here is my gun, Cervera; I ain't afraid of Haydon, and don't want any trouble with him." When the boys reached the "flat," Haydon had returned to the pine tree behind which he stood when the boys first came into the "flat," and, as they were in the act of passing him, Haydon, addressing them, said: "Are you going to keep on driving my horses?" to which the deceased answered, "Yes, I will, if you are on our land," whereupon the defendant fired at the deceased. At this time, the witness was about twenty feet behind the deceased. Immediately

after the first shot was fired, the deceased turned toward his brother and exclaimed, "Run, Cervera; good-bye." A second shot was fired by Haydon, immediately following which the deceased fell from his horse. A third shot was fired by Haydon and Cervera's horse then commenced to rear. Cervera noticed blood flowing from the neck of his horse after the third shot. The witness, after the third shot, quickly dismounted and, with the rifle previously handed him by deceased, as noted, started to run toward the trail leading to the Norgard camp. The witness testified that the defendant fired two shots at the deceased and two or three at him. One shot took effect in the body of deceased, striking him in the breast and producing immediate death. The witness was shot twice in the right arm, fracturing it. One of these shots entered the forearm and the other in the upper arm. The horse upon which the witness was riding at the time of the shooting also bore two wounds in the neck, neither, however, being of a serious nature.

Cervera declared that neither he nor the deceased shot at the defendant, nor did they attempt to do so. He testified that, before meeting Haydon, the deceased fired a shot from his rifle at a quail and also one at a woodpecker.

The defendant's story of the shooting is, briefly, as follows: That, at about 3 o'clock on the afternoon of the day of the homicide, he left the Wathen place on horseback, taking with him a 25/35 Winchester rifle. He went "over on the ridge, west of the creek," where he could look down Eel river. After having been on the ridge a short while, he saw "somebody get around and put the dogs after" his horses and start them in the direction of the point at which he was standing. As the horses approached him he saw that Cervera and the deceased were driving them. When the boys came near where the defendant stood the latter, addressing them, said: "I want you fellows to quit running my horses," to which the deceased replied: "You go to h——l, you old s——n of a b——h. I will run your horses to h——l, you old s——n of a b——h." He then accused the boys of running the horses off the Rorobough land (under lease to defendant), and the deceased made a reply in language similar to that in which he first addressed the defendant. The boys then left Haydon and went "around the hill the way

the horses went," and in about five minutes thereafter returned to the point where they left Haydon. The latter was still standing at said point, holding his rifle in his hands. The deceased, so the defendant proceeded, had his rifle in his hands, and, passing Haydon a short distance, suddenly wheeled his horse so as to face the latter, and, speaking to the defendant, said: "You old s——n of a b——h, you get out of here," and then fired a shot at the defendant. Haydon attempted to return the fire, but, there being no cartridge in his rifle, his weapon did no more, as under such circumstances it could, of course, do no more, than to "snap." Immediately he placed a cartridge in the rifle and fired, both he and the deceased shooting at the same time. Again Haydon shot at the deceased and the latter thereupon fell from his horse to the ground mortally wounded. Cervera, continued the defendant, then jumped to the ground from his horse, picked up his brother's rifle and attempted to shoot. The defendant stepped behind a tree and as he did so Cervera fired a shot. The defendant then yelled to Cervera, "You go on," and the lad thereupon left the scene of the trouble in the direction of his father's cabin. The defendant then left for the Wathen place.

We have now given a synoptical statement of the testimony of Cervera Norgard, upon which the state chiefly relied for the establishment of its case and upon which the jury in the main manifestly based their verdict, and also the story of the defendant as to the circumstances directly leading to and attending the shooting.

There was, it is true, other testimony introduced on both sides relating to the number of shots fired and heard by persons who at the time of the homicide were in the vicinity of the place where it occurred, and also involving certain declarations of the parties relevant to the issues before the court. This testimony, like that of Cervera Norgard and of the defendant as to the circumstances of the shooting, was conflicting.

But, as stated, the principal contention of the appellant with regard to the evidence is that the testimony of Cervera Norgard is inherently improbable, and that the jury, therefore, were unwarranted in believing it or basing a verdict against the accused upon it. This contention grows out of a

number of apparent inconsistencies developed by the cross-examination of the witness and of certain weaknesses which appear to inhere in the very story itself, as related by the boy. For illustration, much, in favor of the defendant, is sought to be made out of those portions of the boy's testimony in which he declared that, without warning or saying a word, the defendant first shot at them; that they (the witness and the deceased) paid no attention to those shots, but proceeded up the hill slowly and leisurely without making any reference to the incident, save the single observation by the deceased that the bullets "came close"; that neither looked back to see whether Haydon was following them, and that they did not, after that incident, cease driving the defendant's horses; that they returned from the pasture to the flat, going in the direction of the spot at which Haydon stood, whereas the evidence shows that they could then have avoided him, "either by continuing along the natural way across the flat, which would have carried them some ninety feet to the north of the tree where the defendant stood, or by going farther to the north across the hill, or by going south along a good trail under the flat." It is further pointed out as indicative of the inherent weakness and unreliability of Cervera's story that he testified that when the shooting commenced and the first shot was fired by Haydon, which evidently missed the deceased, the latter turned in his saddle to the left and, looking toward the witness (who had testified that at that time he was to the right of deceased) said, "Run, Cervera; good-bye," and then, having no weapon, turned and, again facing the defendant, received the shot that resulted in his death. "It is a tax upon one's credulity," say counsel, "to believe that, thus being assaulted, the deceased made no effort to defend himself, but upon being fired upon turned his back toward his assailant and bid his brother good-bye and then turned calmly to receive his death wound." These and many other like apparent and perhaps real contrarieties in Cervera's testimony, as well as contradictions of certain portions of his testimony by other witnesses, are set out and elaborated upon in the argument of counsel to justify a declaration by this court that the verdict of the jury is barren of a sufficient foundation to uphold it.

But, while the alleged variances or inconsistencies apparent in Cervera's testimony and the contradictions referred to undoubtedly afforded opportunity for a persuasive argument to the jury against the reliability of Cervera's testimony, we see in them nothing from which a reviewing court could justly conclude that his entire testimony is, *per se*, unbelievable, and that it was, therefore, the jury's duty not only to wholly disregard it, but to accept the defendant's story of self-defense, or at least find that the latter's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt.

It rarely happens that a case is presented on appeal in which some inconsistencies in the testimony of certain witnesses may not be discovered. These inconsistencies may be due to various causes. It is perhaps quite true that in some instances they are occasioned by the deliberate untruthfulness of witnesses, but more often they are due, we apprehend, to the forgetfulness of witnesses or perhaps to the fact that the occurrences to which they have testified have come about under circumstances that have put the witnesses in such a state of excitement as to cause them to view the incidents which they are required to describe as occurring in a somewhat different way from that in which they may have actually occurred. It is commonly known that there seldom arises a case upon the circumstances of which the witnesses precisely agree in all respects, and yet it by no means necessarily follows that in such cases some one or more of the witnesses have willfully given false testimony relative to the matter to which they have testified. Some one or more may be mistaken, or, as often happens, some might have observed circumstances that others did not. But whatever may be the cause of such differences, it is true that they occur in nearly every case of disputed questions of fact. If, therefore, every case taken to the appellate courts were to be reversed because of discrepancies or contradictions in the testimony of witnesses without whose testimony a verdict of a jury or the findings of a court could not be sustained, there would, indeed, be few cases in which a reversal would not be compelled upon the ground of the insufficiency of the evidence to support such verdict or findings. Reviewing judges are, obviously, in no position to determine the credit which should be ac-

coordinated to witnesses or to weigh their testimony. As has often been repeated, it is for this reason that our constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. In consonance with the spirit and intent of this constitutional provision, the legislature has ordained that the jury are the exclusive judges of the *credibility* of witnesses (Code Civ. Proc., sec. 1847), and are the judges of the *effect* and *value* of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates. (Code Civ. Proc., sec. 2061.) And, as a necessary corollary of the rules above noted, the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the witness, Cervera Norgard (*People v. Phelan*, 123 Cal. 557, [56 Pac. 424]; *People v. Wright*, 4 Cal. App. 706, [89 Pac. 364]; *People v. Turpin*, 10 Cal. App. 530, [102 Pac. 680]; *Clark v. Tulare L. D. Co.*, 14 Cal. App. 414, 432, [112 Pac. 564]), and, therefore, to disbelieve the testimony of the defendant and accept that of Cervera as to the immediate circumstances of the shooting, however weak in places the latter's testimony may have been made to appear, or however sharply his testimony on other important points might have conflicted with the testimony of other witnesses.

But counsel for the defendant declare that the recent amendment to the constitution (sec. 4½, art. VI) has enlarged the power of appellate tribunals with respect to the review of evidence, and asseverate that the effect of that amendment has been (to use their language) "to revolutionize proceedings on appeal," and that "it is now the duty of appellate courts to weigh the evidence where the appellant relies upon the insufficiency of such evidence to warrant a conviction." There is nothing in this record demanding from us, even if this court were disposed to undertake the task, an interpretation of the meaning, intent, purpose and scope of the constitutional amendment to which counsel advert, and we shall, therefore, not attempt to do so; but if there is one prop-

osition in connection therewith of which we entertain no feeling of uncertainty it is that said amendment was not intended to change, nor has it changed, the very sensible rule prescribed by the constitution and for so many years strictly adhered to in this state, that, in the exercise of their appellate jurisdiction, the appellate courts are restricted to the consideration of questions of law alone, and that, therefore, as before stated, the matter of evidence does not constitute a subject of review by those tribunals, except where there necessarily arises from the evidence or is presented thereby, from its very nature, a question of law.

Guided by the rules as we thus understand them, we have examined the record in this case, and, therefore, as to the testimony of Cervera Norgard, we are justified in saying that we perceive nothing in his statements that he and the deceased paid no special attention to the alleged first shots fired by Haydon and that after such shots were fired they proceeded leisurely up the hill, driving Haydon's horses, without looking back to observe the defendant's movements, so startling as to render that portion of his testimony "inherently improbable," so that it may be held by an appellate court that thus, upon his evidence, upon which the verdict was chiefly founded, a question of law is presented. It may readily be conceded that it would seem unreasonable that the witness and the deceased, having been shot at twice by the defendant, made no preparation to defend or to shelter themselves against further assault by their antagonist. In other words, it would no doubt be regarded as unusual conduct upon the part of any sensible person to do and act as the witness testified that he and the deceased did and acted under the circumstances mentioned. But, on the other hand, it is not in a sense uncommon to find persons so imperturbable to physical fear that they will unflinchingly and desperately and, very often, unnecessarily, pursue a course of conduct involving the greatest physical peril to themselves and which the average person would not be guilty of. Yet we cannot see how it could be held, from the mere statement itself disclosing such conduct, that such statement is not true or is improbable upon its face. A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable, *per se*, must involve, we think, a claim that

something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do. Again, let it be conceded that Cervera told an untruth when he said that he and his brother paid no heed to the shots first fired by Haydon; that he lied when he said that, after those shots, they proceeded up the hill without looking back to see what the defendant was doing; that he falsified when he said that, just before the fatal shooting, the deceased delivered to him the automatic rifle carried by the former in a scabbard; that it was not true that Haydon shot twice or three times at him (the witness) while the latter was fleeing over the trail leading to the Norgard camp, or that he shot at him at all; that the testimony of the witness at the trial was at variance in certain particulars with statements previously made by him or with his testimony at the preliminary hearing; yet those untruths, if untruths they were, and discrepancies between his testimony at the trial and that previously given, cannot be justly said to stamp the story of the witness as to the immediate circumstances of the fatal shooting of Morris Norgard by Haydon as improbable or inherently unbelievable. The matters referred to were, as stated, for the jury to consider in their determination of the ultimate question submitted for their decision, viz., whether the life of the deceased was taken under such circumstances as to make the act one of murder or manslaughter or whether they disclosed no crime at all. Haydon admitted shooting and mortally wounding the deceased, and the main controversy was as to the circumstances under which he did that act—whether he wantonly or without excuse shot and killed him or did the act in defense of his own person. If, therefore, the jury, as manifestly they did, believed the testimony of the witness, Cervera Norgard, in the main—if, indeed, they believed only that portion of his testimony bearing upon the immediate circumstances of the killing, and thus became satisfied beyond a reasonable doubt of the defendant's guilt, it was, of course, within their province to plant their verdict upon that particular portion of his testimony, although they might have regarded the statements of the witness on other points as of doubtful verity.

Under our view of the evidence the verdict is amply supported.

2. Cervera Norgard, having been asked by the district attorney why he went to Long Ridge a few days prior to the homicide, explained, in reply, that his father had sent him there with a message, to be delivered to his brothers, relating to certain of his cattle that had strayed from his range—a circumstance to which we have already adverted. This message was in the form of a postal card which had been received by Chris. Norgard at Covelo from the owner of a range situated in the neighborhood of the Norgard range, informing Norgard of the whereabouts of said cattle, and on which Chris. Norgard, addressing his sons, had written these words: "If you see Holtorf [the writer of the postal card] be sure and thank him for telling us." The postal card, in connection with Cervera's testimony, was offered by the people and, over objection by the defendant, admitted in evidence by the court. That portion of the postal card particularly objected to involved the request by Chris. Norgard that Holtorf be thanked for giving the information concerning the strayed cattle, and the argument directed against it is that, the prosecution having anticipated an attack by the defense against the character of the Norgard family generally, hoped to impress the jury that said family maintained a good standing with their neighbors, from the fact that one of such neighbors had taken the pains to notify them of the whereabouts of their strayed cattle. We have not been able to discover any particular or substantial purpose that could be subserved by the introduction of the postal card in evidence, since there is nothing in the record to indicate that Cervera went to the range for any other purpose than that stated by him, and since it is an undisputed fact that he was on the range on the day of the shooting and witnessed the fatal affray. Yet it is very clear that the mere fact that it was thus made to appear that Chris. Norgard desired that his gratitude be expressed to a neighbor for voluntarily giving him information concerning his missing cattle would not necessarily establish, nor could it even have a very strong tendency to establish, in the minds of the jury, a general good reputation for the Norgard family either for honesty and integrity or peace and quiet in the neighborhood in which the latter's range was situated.

In our opinion the postal card, as evidence, was without any force in any direction, except in so far as it tended to corroborate Cervera Norgard as to the purpose for which he went from Covelo to Long Ridge a day or two prior to the shooting; and for that purpose, it was, under the record, as already suggested, altogether unnecessary. There is no reference to the defendant in the postal and no language therein intimating that he was in any way concerned in the subject matter thereof, and from whatever angle the ruling admitting the card in evidence may be viewed, we can discover no possible harm that could have resulted to the defendant therefrom.

3. To the following question, propounded on cross-examination to Cervera Norgard by one of the attorneys for the defendant, the court sustained the objection that "it is purely argumentative": "As you ran anywhere from this cross [referring to a point marked on the map used at the trial] to the point directly north of the pine tree—in fact, all of the time your left side was directed to him [defendant], wasn't it?" The evidence disclosed, it will be remembered, that Cervera received two wounds in the right arm, his testimony being, as it will also be recalled, that, after mortally wounding Morris Norgard, the defendant shot at Cervera while the latter was running from the scene of the killing. The theory of the defense at the trial was, and it is so argued here, that the first shot fired by the defendant at the deceased, having missed the latter, struck Cervera, who was near the deceased at the time of the firing of said shot and in range of the bullet from defendant's rifle. The object of the cross-examination of Cervera in that particular was, therefore, to show that he did not tell the truth in his recital of the circumstances under which he received his wounds; that, as a matter of fact, instead of being shot while fleeing from the spot where his brother met his death, he was accidentally shot by the defendant as above related.

We do not think the question was improper or is amenable to the objection upon which the court disallowed an answer thereto, yet we think that the ruling was without prejudice for the following reasons: A map of the immediate vicinity in which the homicide occurred and on which all the important physical objects thereabouts were delineated and on which

the cardinal points of direction and the distances from one to the other of the several important physical objects were noted, was received in evidence and used in illustrating the testimony. By this map the witness, Cervera, gave his testimony, pointing out thereon the respective positions of the defendant, the deceased and himself at the times of the firing of the several shots. He thus illustrated the position of the defendant and the direction in which he himself claimed to have been going at the time, as he testified, the defendant fired at him. He testified that he did not know whether his left side was toward defendant at the time of the firing of the shots or not, but it is very clear that, from his description of the respective positions of himself and defendant at that time, by the use of the map referred to, there could be no difficulty in determining whether his left or his right side was toward the defendant at the time the latter fired at him. Even, therefore, after showing on the map where the defendant stood and where and in what direction he was running at the time he was shot at, he should have given an answer to the disallowed question contradictory to the description of their relative positions as the same were pointed out by him on the map, the jury would have readily discovered the discrepancy and, under the circumstances, would not necessarily have ascribed it to any intention on the part of the witness to lie about it. If, in other words, the witness, relying upon his own unaided recollection, had said that his right side was toward the defendant, and then by pointing out their respective positions on the map showed that his left side must have been toward the defendant, the jury would doubtless, under such circumstances, have conceived the discrepancy to have been the result of a mistake and not a desire on the part of the witness to lie about the matter. But, as shown, the fact is, that the witness said that he was not certain whether his left or his right side was toward the defendant. The ruling was absolutely harmless.

4. The court did not err by allowing to be received in evidence the over and under shirts worn by the deceased at the time he was shot. These articles were introduced in connection with the testimony of Cervera Norgard. Counsel for the defendant complain that, since there was no dispute as to the character of the wound inflicted upon the deceased by the

defendant and from which death ensued, and there being, therefore, no necessity for placing those articles, "gory and gruesome" from matted blood, before the jury, the result of the ruling allowing them to be exhibited at the trial was only to greatly prejudice the jury against the defendant. But, whatever might have been the tendency of the gruesome exhibits, apart from the legitimate purpose for which they were offered and received, it is clear that the people, in making their original case, were entitled to thus corroborate the testimony of the witness, Cervera, with regard to the manner in which his brother came to his death. (*People v. Hower*, 151 Cal. 645, [91 Pac. 507].) The people, in the maintenance of the burden cast upon them of proving the guilt of one charged with crime, are not supposed to anticipate the contentions or concessions, if any, which the defendant intends to make, or, in other words, to assume that certain matters or theories supporting the hypothesis of guilt will not be disputed by the defendant. By the garments received in evidence the point of entrance of the bullet into the body of the deceased could be approximately shown, and thus would Cervera not only be corroborated as to the shooting, but (the shot having taken effect in a vital part of the body) the intention of the defendant to inflict a mortal wound to some extent disclosed. At any rate, as declared, the people had the right to establish their original case by the introduction into the record of any relevant fact, circumstance or physical object having a tendency to prove the death of the deceased by violent means and that the act causing death was criminal.

5. The witness Travis, who was a member of the jury summoned by the coroner to inquire into the cause of the death of the deceased, was asked by the district attorney whether the defendant testified at the inquest, and whether there was anything said about taking his testimony. No objection was interposed to these questions and the witness answered them in the negative. He was then asked whether Haydon appeared at the scene of the homicide, where the inquest was held, while the investigation was in progress. To this question an objection on general grounds was made and overruled. The answer was that the defendant was not present at the inquest. It is here argued that the ruling was erroneous and prejudicial. It was, in our opinion, imma-

terial whether Haydon did or did not testify at the coroner's inquest, so far as the fact itself was concerned, but, the witness having been permitted, without objection, to say that he did not testify at that investigation, it would seem to be the more reasonable view that, if having any effect upon the jury at all, the answer to the question complained of was favorable rather than unfavorable to the accused. To be more explicit, the statement that he did not testify at the inquest, if not satisfactorily explained, as manifestly it was by the answer to the question objected to, might have been construed by the jury in a light unfavorable to the defendant—as, for illustration, the jury might, and probably would, have concluded, had they not been made acquainted with the fact that the defendant was not present at the inquest, that his failure to voluntarily explain or offer to explain to the coroner's jury how the homicide happened was due to a consciousness of guilt.

6. The same witness having, shortly after the homicide, appeared at the scene of the shooting and with others examined the ground thereabouts in search of empty cartridge shells, was asked on cross-examination at what distance from the point where the body of the deceased lay he ceased looking for shells. To this question an objection by the people was sustained on the ground that the same question had been asked by counsel for the defendant and answered by the witness several times previously. The ruling was proper. The witness had before been asked some three or four times how far from the body he had gone looking for shells. Once he answered that he went no farther than eight or ten feet from the body. At another time he said that he went "ten, twelve or fifteen feet." It is evident from these answers that the witness could not have given the distance any more accurately than was thereby given, and the question to which objection was sustained could, therefore, have accomplished no more in that regard than was disclosed by said answers.

7. The witness, Ornbaum, testifying on behalf of the defendant, declared that the general reputation of the deceased for peace and quiet in Round Valley, Mendocino county, where the Norgard family reside, was bad. On cross-examination the district attorney sought to show by the witness that for many years the residents of Round Valley were

divided into factions growing out of differences of views on matters of local concern, and between which factions intensely bitter feelings of hostility had been developed and were sustained for a long period of time, the result of which was that members of the respective factions constantly carried on a sort of warfare of criminations and recriminations. It was not directly shown that the Norgard family was identified with either of these factions, but the object of this cross-examination was presumably to show that the Norgard family, including the deceased, did belong to one of said factions, and that the adverse criticisms or derogatory statements from which the witness formed his conclusion as to the general reputation of the deceased in Round Valley were merely those that were directed generally against the faction of which the Norgard family were members rather than from anything generally said derogatory of the character of the deceased for peace and quiet. The specific objection to this line of cross-inquiry was that it had not been shown that the testimony thus sought to be brought out had any application to the deceased or his family. The objection was disallowed. We suppose the real ground of the objection counsel intended to make was that the Norgard family, more particularly the deceased, had not been shown to have belonged to one of the factions referred to. We think the cross-examination was pertinent and proper. It will not be denied that the district attorney was authorized to secure from the witness the facts constituting the basis of his statement regarding the general reputation of the deceased so as to show, if thus he could, that the witness' testimony upon that question was founded upon remarks or statements of neighbors of the deceased having no particular reference to the latter or no more reference to him than they had to others belonging to the same faction to which he belonged. The answer of the witness was that the people of Round Valley had been divided on a "wet and dry fight" (the liquor question, we apprehend) and that there had been "a good deal of gossip around there lately" growing out of that question. It is to be conceded that the district attorney did not *directly* show that the deceased or his family were in any manner connected with either of the factions arraying themselves against each other on the "wet and dry fight," and consequently made a very slight showing

toward the establishment of the point he thus attempted to develop; yet his failure to show what he thereby sought to prove argues nothing against the propriety of such cross-examination or any cross-examination having a legitimate tendency to disclose that there existed no real foundation for the direct testimony of the witness that the general reputation of the deceased in Round Valley for the traits referred to was bad. The objection, it seems to us, is rather to the evidentiary value or weight of the testimony thus sought to be elicited than to its competency. At any rate, the answer could have resulted in no harm to the defendant. If, as the defendant insists is true, the testimony thus brought out did not tend to show that the witness had grounded his testimony as to the general reputation of the deceased upon the aspersions cast generally upon a faction to which the deceased belonged by the members of an opposing faction, it had no tendency to show anything, either favorable to the prosecution or unfavorable to the defendant. Indeed, if having any force at all, one way or the other, the effect of the failure of the district attorney to break down the force of the witness' direct testimony relative to the reputation of the deceased would be favorable rather than unfavorable to the defendant.

8. What we have said with respect to the rulings on the cross-examination of the witness Ornbaum disposes of the exceptions to the rulings of the court permitting a similar cross-examination of the witness Lacy Gray, who testified on his examination in chief that the reputation of the deceased for peace and quiet in Round Valley was bad.

9. It is contended that the court erred to the prejudice of the defendant by allowing the district attorney to go into the question, on cross-examination of the witness Palmer (step-father of John Wathen), whether the witness had been, during practically all the time in which the trial had been in progress, greatly under the influence of intoxicating liquors. The witness, in behalf of the defendant, had testified that a few weeks prior to the day on which the homicide occurred and about six months previously to the trial of this case he had a conversation with Chris. Norgard, in Covelo; that he (the witness) called on Norgard for the purpose of selling or offering to sell him the Wathen place; that Norgard said that he would not buy the place, and that if any other person

bought it he would continue to run Long Ridge, as he had "come as near" doing "as any man that has been on Long Ridge"; that he would "send the boys, my fighting men down," etc. The purpose of the questions propounded to Palmer by the district attorney was to show that, from an inordinate use of alcoholic stimulants, the memory of the witness had become unreliable, and thus it was designed to disclose either that he might not have accurately recollected what Norgard actually said to him on the occasion mentioned or that, Norgard not having then made the implied threats to which the witness testified, the latter had committed to memory, for the purpose of the trial, a fabricated story of the former's part in the conversation. There are two answers to the exceptions registered here to this line of cross-examination. In the first place, it is only the statement of an elementary proposition when it is said that a party may with perfect propriety propound any proper questions to an adverse witness for the purpose of testing his memory as to the facts or circumstances to which he testifies. Indeed, whether a witness is of good or bad memory constitutes one of the common tests by which the jury are enabled to determine the amount of weight which they should give his testimony. Therefore, any legitimate line of inquiry, prosecuted in good faith, or for which there exists a reason, bearing upon the question of the witness' memory or want of memory, is eminently proper. The examination of Palmer on this line by the district attorney developed that there existed legitimate ground for the inquiry. To the first question asked him as to his conduct with regard to his condition for sobriety (or inebriety), he replied that he had been drunk "pretty near all of the time, I guess." This answer, it is true, was stricken out on motion of the defendant to give him an opportunity "to put in an objection" to that course of cross-examination of the witness. But the answer, nevertheless, disclosed that the question was asked not merely to prejudice the witness, but because there was a substantial reason for asking it. Later, however, the district attorney put to the witness this question: "You say you have been drunk about ever since you have been here?" to which the witness replied: "All the time I wanted to." There was no objection to this question, nor was there a motion made to strike out the answer, and this suggests the

second reason why the exception urged here on this line of inquiry can avail the defendant nothing. The assignment of error to which counsel excepts in his brief refers to the first question and answer relative to the condition of the witness, but, as the court struck that answer from the record, as we have shown, on the motion of the defendant, and as there appeared a reason for that line of cross-examination—that is, that there was justification for that line of inquiry and that it was not conducted for the purpose merely of degrading the witness in the estimation of the jury—there is, therefore, nothing of which the objection can be predicated or on which it can properly be pressed on this appeal.

10. The witness, Reid, having testified that the general reputation of the deceased for peace and quiet in the Mad river section of Trinity county was good in the years 1903, 1904 and 1905, was asked the following question on cross-examination by counsel for the defendant: "Did you hear of his being accused of robbing the Mason & Thayer safe at Douglas City?" To this question an objection by the district attorney was sustained. It is now argued with apparent earnestness that the ruling was erroneous and prejudicial. But we cannot take that view of said ruling. In the first place, the witness was asked nothing concerning the general reputation of the deceased for those traits of character essentially involved in the crime of robbery, of larceny or of burglary. In the second place, in view of the nature of the charge upon which the defendant was on trial, it would have been manifestly improper to have prosecuted an inquiry on the direct examination of the witness for the purpose of developing the general reputation of the deceased for honesty and integrity. The question was, therefore, neither proper cross-examination, nor in any sense relevant. It does not follow, as the question necessarily assumes, that, because a person may be wanting in honesty and integrity, he cannot at the same time be of a quiet and peaceable disposition in the sense in which the last-mentioned traits become important on an issue as to which of two combatants in a physical encounter was the aggressor or culpable party. Testimony relative to the reputation for peace and quiet borne by the actors in an affray leading to the prosecution of one or both for a criminal offense necessarily involving those traits is generally intro-

duced only where the case is a close one upon the question whether the accused was or was not justified in committing the act, and the issue thus submitted is not, obviously, whether the party is honest and of integrity, but whether he is or is not of a quarrelsome and pugnacious character and readily open at all times and at any moment to a physical combat without just or any reason. The utter untenableness of the contention of appellant may be illustrated by the absurd result to which it would logically lead, for, if testimony of the good reputation of a person for peace and quiet may properly be rebutted by testimony of his bad reputation for honesty and integrity, then, by parity of reasoning, his bad reputation for peace and quiet may properly be overcome by evidence that he bears the general reputation of being a person of honesty and integrity. But the true rule as to character evidence is that such testimony ought always to be confined to the trait of character which is in issue, or ought to bear some analogy and reference to the nature of the charge. (3 Greenleaf on Evidence, 12th ed., sec. 25; Phillips on Evidence, p. 490; *State v. Beal*, 68 Ind. 345, [34 Am. Rep. 263]; *State v. Marks*, 16 Utah, 204, [51 Pac. 1090].) The question asked the witness here and disallowed by the court called for testimony, as we have shown, bearing no analogy to the charge or any of the elements thereof against the accused, and, since the party whose character was under attack was not a witness and, therefore, his credibility as such not put in issue, the testimony thus sought to be brought out was not relevant for any purpose. (*State v. Marks*, 16 Utah, 204, [51 Pac. 1090].)

11. We now come to the last point involving rulings on the evidence upon which we feel impelled to bestow special attention. The proposition thus presented is the most important of the many submitted on this appeal, and its solution will require a careful review of the circumstances giving rise to it.

It will be recollected that John D. Wathen intermarried with the daughter of Chris. Norgard, and that on account of said marriage a feeling of hostility was generated between the Norgards and Wathen. The latter, while used for certain purposes as a witness for the people, was also called to testify in behalf of the defendant. Testifying for the latter, he said

that he saw the deceased and his brother, Elmer, a few days before the homicide; that they passed his house at a distance of about twenty-five feet therefrom, and that neither addressed him; that each carried a rifle incased in a scabbard, which was strapped or attached to the stirrups of his saddle; that, on the afternoon of the day of the homicide and a short time prior to the shooting, he and his half-brother, Palmer, rode over to Bald Mountain, and that at that time they saw the defendant's horses (those driven to the flat by the deceased and his brother, Cervera) grazing on the Rorobough land, which, as shown, was under lease by Haydon; that, when he last saw the horses (about an hour and a quarter before the shooting) they were going farther in on the Rorobough land. He further testified that, in going in a direct line from the Norgard pasture, to which the deceased and his brother went after driving defendant's horses to the point already referred to on "the flat," to the Norgard camp it was not necessary to go nearer than about seventy-five feet to the spot where the deceased's dead body lay or where the shooting occurred. In other words, he said that the natural direction from the pasture to the Norgard cabin was seventy-five feet distant and north of the precise spot where the shooting took place, and that there was no natural trail passing right by the body. Manifestly, the purpose of all the foregoing testimony was to show that the deceased himself was seeking trouble with the defendant and that he drove Haydon's horses off the Rorobough range, on which they were entitled to graze, and unnecessarily put himself in the way of the defendant for no other reason than to precipitate a physical conflict of some character with the latter.

Wathen admitted, on his direct examination, that, although on friendly terms with the Norgard family prior to his intermarriage with Norgard's daughter, after that event his relations with his wife's family had always been unfriendly; but, on cross-examination, the district attorney asked him whether his feeling toward the Norgards was not very bitter, to which question he replied in the negative, saying, however, that he merely had "no use" for the Norgards. To show the intensity of his hostility toward the Norgards, the district attorney questioned the witness as follows: "Q. Did you send for Tom Haydon to come in there and take your property off

your hands? A. No, sir. I didn't. . . . Q. Didn't you induce Mr. Haydon to come in there, and induced him to take the land off your hands because you believed he would kill the Norgard boys? A. No, sir, I did not. Q. You wanted some man to take hold of that land that you believed would kill them, didn't you? A. No. Q. That thought never entered your mind? A. No." The witness was then asked if he recalled having a conversation with one Dan English, near the postoffice, in Covelo, in the latter part of November, 1910, and prior to the homicide, and in the course of which he declared that he "had sold out to the right man, all right," that "Haydon would not stand for what you [the witness] had stood for, and the first time that Haydon caught these Norgard boys running these horses he would shoot them off their horses?" The witness admitted having a conversation with English at the time and place mentioned, but said that he had no recollection of making the statement concerning Haydon and the Norgard boys embraced within the question, although he admitted that he might have made it.

No objection was made by the defense to any of the foregoing questions so propounded to Wathen.

In rebuttal, the people called said English to the stand and, over the objection of the defense, were permitted to ask him the following question, to which he made an affirmative answer: "I will ask you whether or not he [referring to Wathen] stated to you on that occasion [the time and place having been given] 'that he thought he had sold out to the right man, all right, and that the first time that Haydon caught the boys running his horses he would shoot them off their horses.'"

The specific objection to this question was that it called for testimony relating to a collateral matter, brought out by the people themselves, and by which they were bound. The asserted theory upon which the question was propounded and an answer thereto allowed was that it was in impeachment of Wathen on a matter which was material, because it affected or involved the question of his credibility as a witness.

While we think that the district attorney could perhaps have well rested this phase of his case on the statement of Wathen that, at the time of the trial and for some time before the homicide, he was on unfriendly terms with the Norgards;

we are of the opinion, after a careful analysis of Wathen's testimony in the particular under consideration, that the testimony of English was proper as in impeachment of Wathen on the point to which it related. It is true, ordinarily, that the admission of a witness that he was not friendly with the party against whom he had testified in chief would be a sufficient predicate for an argument or, possibly, an inference that his testimony was or might be biased or that he might have exaggerated the nature and importance of the circumstance or circumstances to which he had testified. But it will be observed that Wathen said that he was not "*bitterly unfriendly against*" the Norgards, but that merely he had "no use for them"; that he did not "know anything against them," which statements would imply that his unfriendly feeling toward the Norgards was of an indifferent character—that is to say (to present the idea more clearly), that, while his relations with that family were not amicable, still he harbored no feeling of resentment or revenge against them and entertained no such sentiments toward them as would induce him to treat them unfairly or unjustly in this case, or, for that matter, under any circumstances. This is undoubtedly the view that the district attorney and the court took of his testimony addressed to the point under consideration. Now, then, we do not think that the proposition can be doubted that, where a witness, who admittedly entertains a feeling of unfriendliness toward the opposing party, undertakes to convey the impression to the jury, or the judge, if the facts are so tried, that such feeling does not reach that degree of animosity or that point of violent hatred that, in view of human frailties, may safely be said will ordinarily lead a witness to color or exaggerate statements calculated to injure his adversary, the extent or degree of enmity that really exists in the breast of such witness against his opponent, or the person against whom he has testified, may properly be shown. In other words, the district attorney was not compelled to accept as conclusive what appears to be the natural and reasonable import of Wathen's testimony that, while he was unfriendly with the Norgards, his feelings in that respect were merely of an apathetic character, but was entitled to show that the witness entertained a very bitter feeling against the Norgards and thus furnish all possible aid to the jury

in determining how much, if any, weight Wathen's important testimony against the theory of the defendant's guilt as contended for by the prosecution was deserving of. It may be true, as counsel for the defendant assert, that English's testimony had a much more far-reaching effect upon the jury than that of the only purpose for which it was admissible, viz., to impeach the testimony or the credibility of Wathen, yet this is not, and never has been, a ground on which impeaching evidence may be excluded. It is doubtless true that in very many instances impeaching testimony has brought before a jury matters which could not be made the subject of independent or substantive proof, but, in such cases, if the party against whom such testimony is received, would avoid, as far as possible, any damaging effect it might have and which it was not designed to produce, he should request an instruction expressly limiting its consideration by the jury to the purpose for which it was admitted and is admissible. (*People v. McCrae*, 32 Cal. 98; *People v. Collins*, 48 Cal. 277; *People v. Estrado*, 49 Cal. 171; *People v. Ah Yuts*, 53 Cal. 613.)

But Wathen admitted, in answer to questions to which no objection was interposed, that he *might* have made the remarks which English declared that he made in the conversation mentioned, and from that admission the jury could have reasonably inferred that he at least entertained the opinion which English said he expressed as to what Haydon would do with the Norgard boys if the circumstances indicated arose. No person will, ordinarily, admit that he might have expressed an idea or an opinion to which he has no recollection of giving utterance if that idea or opinion had never entered his mind, and the average mind would so construe such an admission. Under this view, the testimony of English, even if it might correctly be held to have been improperly allowed, could not have had the effect of damaging the defendant much, if any, more than Wathen's admission that he might have made the remarks attributed to him by English.

We have now given special attention in this opinion to all the assignments of error growing out of the rulings on the admission and rejection of evidence, with the exception of those numbered 2, 6, 7, 8, 9, 10, 14 and 15 in the order in which these assignments are discussed in the defendant's opening brief. As to the last-mentioned assignments, it may

be remarked that we have given each of them careful consideration and have found nothing therein prejudicial to the accused or that seems to entitle them to special notice.

We have with equal care and much patience examined the whole record, consisting of eight large volumes of the stenographer's transcription of the testimony and the voluminous briefs, exhaustively and ably treating the numerous points pressed upon us for a reversal of the judgment and the order of the trial court, but we have thus discerned no just reason for declaring that the defendant was not fairly and legally tried and justly convicted. The judgment and order are, therefore, affirmed.

Chipman, P. J., concurred.

Burnett, J., concurred in the judgment.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1912, and the following opinion then rendered thereon:

THE COURT.—The petition of defendant for a rehearing of this cause in the supreme court is denied.

The opinion of the district court of appeal contains the following passage concerning section 4½, article VI, recently added to the constitution:

"But if there is one proposition in connection therewith of which we entertain no feeling of uncertainty, it is that said amendment was not intended to change, nor has it changed, the very sensible rule prescribed by the constitution and for so many years strictly adhered to in this state, that, in the exercise of their appellate jurisdiction, the appellate courts are restricted to the consideration of questions of law alone, and that, therefore, as before stated, the matter of evidence does not constitute a subject of review by those tribunals, except where there necessarily arises from the evidence or is presented thereby, from its very nature, a question of law."

This court regards this statement as wholly unnecessary to the decision of the case. The denial of the petition for a rehearing is not to be understood as an indication of approval or disapproval of said statement by the supreme court.

[Civ. No. 924. Third Appellate District.—March 25, 1912.]

A. D. GREEN, Respondent, v. GEORGE A. ROGERS, Justice of the Peace in and for Gridley Township, County of Butte, Appellant.

JUSTICE'S COURT—DEMURRER AFTER TIME TO ANSWER—DEFAULT—PROMISE OF JUSTICE—TRIAL WITHOUT NOTICE—INEFFECTIVE APPEAL—IMPROPER WRIT OF REVIEW.—Where it appears that, on the fifth day after service of summons from a justice's court requiring answer in three days, defendant filed a demurrer, and his default was entered on the same day, and that nine days thereafter the justice promised defendant to take no action during his absence on vacation, but entered no order to that effect, and the trial was had four days thereafter, in defendant's absence, without notice to him, and judgment was entered, without passing upon the demurrer, after knowledge of which defendant took an ineffective appeal therefrom, it is held that, after the time for appeal had expired, the superior court erred in granting a writ of review to annul the judgment and ordering the justice to pass upon the demurrer.

ID.—PRESUMPTION AS TO TIME OF FILING DEMURRER—FAILURE TO AVER FILING BEFORE DEFAULT.—Since it appears that the filing of the demurrer and the entry of default took place on the same day, and it is not alleged whether the filing of the demurrer was prior or subsequent to the entry of default, and it was clearly filed after the expiration of the time to answer, it must be presumed that it was filed after the entry of the default, and if so filed it conferred no right without first having the default vacated, which does not appear to have been asked for or entered.

ID.—EFFECT OF FILING AFTER DEFAULT—NOTICE OF TRIAL NOT REQUIRED.—The subsequent filing of the demurrer, after default, did not prevent the court from setting the case for trial, and trying it without notice to defendant, since, being in default, he was not entitled to such notice.

ID.—PROMISE BY JUSTICE—NOTICE TO PLAINTIFF NOT SHOWN—RIGHT TO SPEEDY TRIAL.—Since it does not appear that the plaintiff, who had entered the default of the defendant, had any notice or knowledge of the verbal promise of the justice to the defendant, and the action being one for the summary restitution of leased property, the plaintiff had the right to a speedy trial thereof, in the absence of the defendant, after proper proof of the entry of his default.

ID.—CONDITIONS OF WRIT OF REVIEW—ABSENCE OF REMEDY BY APPEAL—LOSS BY LACHES A BAR TO WRIT.—The writ of review issues

only where there is no remedy by appeal which has existed, and where the petitioner has failed to avail himself of that remedy, or the right of appeal has been lost by his laches, so that the time in which he might have taken an appeal has thus gone by, the remedy by the writ of review is not open to him.

ID.—OFFICE OF WRIT LIMITED TO ANNULMENT.—Section 1074 of the Code of Civil Procedure plainly limits the power of the court, upon a writ of review, to the determination of the single question whether the inferior tribunal has exceeded its jurisdiction or has regularly pursued its authority, and where it has not regularly pursued its authority, the writ should be limited to the annulment of its proceedings, and should not direct any affirmative action to be taken by the inferior tribunal.

APPEAL from a judgment of the Superior Court of Butte County upon a writ of review. John C. Gray, Judge.

The facts are stated in the opinion of the court.

J. R. King, and Lon Bond, for Appellant.

R. C. Long, for Respondent.

CHIPMAN, P. J.—Plaintiff petitioned the superior court of Butte county for a writ to review the proceedings of defendant in an action entitled A. E. Cole, plaintiff, v. A. D. Green (petitioner here), defendant. It appears from the complaint herein that on July 11, 1911, said action was commenced in said above-entitled court for the restitution of possession of certain leasehold property held by said Green; on July 13, 1911, summons was duly served and filed commanding defendant therein to answer within three days from date of service; on July 18, 1911, defendant, by his attorney, R. C. Long, filed a demurrer to the complaint. It is then averred that, about July 27, 1911, the said justice promised said attorney that he would postpone all proceedings in the case "until said attorney should return from his vacation" (no time stated); that afterward, to wit, on August 1, 1911, the said justice, at the request of the attorney for said Cole, plaintiff in said pending action, brought the case to trial without notice to defendant or his attorney as required by section 850, Code of Civil Procedure, and, after hearing evidence, the said justice rendered judgment, as prayed for in the complaint in

said action, for restitution of the premises and for treble damages; that said demurrer was never ruled upon by said justice; that, on August 8, 1911, without notice to defendant or his attorney therein, said justice issued execution, to the constable of said township, on said judgment, which was by said officer executed; that "said judgment was and is illegal and void and the said justice exceeded his jurisdiction therein, and that the said defendant cannot appeal said action for the reason that the time for appeal has expired, and plaintiff herein and petitioner has no plain, speedy or adequate remedy except by writ of review."

It appears from the return and is shown by a copy of the justice's docket that, on July 18th, the day on which demurrer was filed in the original action, and on the motion of plaintiff's attorney, the default of defendant was entered on the ground that he had "not answered within the time provided by said summons"; that on August 1st, witnesses were sworn and the case was submitted and judgment entered for plaintiff. Other entries in the docket are: "August 8th. Execution issued. August 16th. Execution returned as served and same filed. August 31st. Notice of appeal filed. September 2nd. Undertaking on appeal filed. September 7th. Papers on appeal sent Superior Court. November 1st. Writ of Review received from Superior Court. November 3rd. Papers on appeal sent back to this court."

It appears that Green, defendant in the original action, filed notice of appeal on August 31, 1911, and an undertaking on appeal on September 2, 1911, but no copy thereof was served "on the adverse party" as required by section 974, Code of Civil Procedure, nor was notice of the filing of the undertaking "given to the respondent" as required by section 978a of the same code. It is conceded that the attempted appeal was ineffectual for any purpose. The matter stood thus when, on November 1, 1911, plaintiff in the present proceeding filed his petition in the superior court for a writ of review, and, on November 20, 1911, the court entered its judgment "that the defendant George A. Rogers, Justice of the Peace . . . restore the case of *Cole v. Green* to his calendar, notify the parties of the time and place of hearing the demurrer, and then proceed with the usual course in disposing of the case

as though nothing had been done heretofore." From this judgment defendant appeals.

The writ of review may be granted when an inferior tribunal "has exceeded the jurisdiction of such tribunal . . . and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." (Code Civ. Proc., sec. 1068.) "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, . . . has regularly pursued the authority of such tribunal. . . ." (Code Civ. Proc., sec. 1074.)

In *Elder v. Justice's Court*, 136 Cal. 364, [68 Pac. 1022], it was held that, under section 850, Code of Civil Procedure, when the party served with process has appeared, he is entitled to notice of the time fixed by the justice for the trial of the cause, and that such notice is imperative, and is as essential to the authority of the justice to proceed upon the trial of the case as is the summons and return of the service thereof to his entering judgment by default. "The giving of the notice is a duty which the statute imposes upon the justice before he has any authority to proceed with the trial." In that case Elder had not received notice of the trial and the time for appeal had expired, but the court said that there was no unnecessary delay in initiating the *certiorari* proceedings after "the respondent had knowledge of the judgment against him." In the case here defendant in the original action had knowledge of the judgment against him, as shown by his notice of appeal filed in the case. It was three months after judgment when he commenced the present proceeding.

It is not alleged nor does it appear that the demurrer was filed before the default of defendant was entered. If filed after default was entered, it conferred no right without first having the default vacated which was not asked and was not entered. The subsequent filing of the demurrer did not prevent the court from setting the case for trial and trying it without notice to defendant, for, being in default, he was not entitled to notice and, we think, it must be assumed that the demurrer was filed after the default was entered.

It is alleged that the justice verbally promised counsel "to postpone and continue all the proceedings in said case until said attorney should return from his vacation." It does not appear that plaintiff's attorney in that action had any notice

or knowledge of any such arrangement and no order or record of the court was made of such indefinite continuance. The action was summary in its nature entitling plaintiff therein to a speedy trial. We do not think the alleged verbal statement of the justice can be regarded as an order of the justice's court continuing the case to an indefinite period. However this may be, and whether the demurrer preceded the default entered, the fact is that defendant knew that the case had been tried and the judgment of the court entered and he had an adequate remedy by appeal. No reason is shown for his not having availed himself of this remedy, and the remedy by writ of review is, therefore, not open to him.

In *Elder v. Justice's Court* the time for appeal had expired without fault of respondent, an entirely different case from the one here. It was said, in *Valentine v. Police Court*, 141 Cal. 615, 617, [75 Pac. 336]: "The writ of *certiorari* issues only in cases where there is no remedy by appeal. (Code Civ. Proc., sec. 1068; *White v. Superior Court*, 110 Cal. 54, [42 Pac. 471].) And this rule applies with equal force where the right of appeal has been lost by laches. (*Faut v. Mason*, 47 Cal. 7; *Bennett v. Wallace*, 43 Cal. 25.)" Here the right of appeal was lost by laches and not through some condition of circumstances such as appeared in *Elder v. Justice's Court*, 136 Cal. 364, [68 Pac. 1022]. It was said in *Grant v. Justice's Court*, 1 Cal. App. 383, 388, [82 Pac. 263, 265]: "No litigant should be permitted the use of the writ of review where he has the right of appeal. Nor should he be allowed the writ where he slumbers on his right of appeal until the time in which he might take such appeal has gone by."

Appellant makes the point that the judgment exceeded the powers given by section 1074, Code of Civil Procedure, and was not such determination as is therein contemplated. This section plainly limits the court to the determination of the single question—whether the inferior tribunal has regularly pursued its authority. The judgment should be to annul the proceedings where the inferior tribunal has not regularly pursued its authority.

The learned trial judge doubtless thought that defendant in the original action had suffered a wrong from which he should in some way be relieved. But established rules of procedure cannot be disregarded to meet individual cases with-

out setting at large the rules themselves and destroying their vitality.

The judgment is reversed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1079. Second Appellate District.—March 26, 1912.]

MARY LOUISE CARLE, Appellant, v. LOUISE HELLER,
LOUIS CHARLES HELLER, and CHARLES C. HEL-
LER, Respondents.

HUSBAND AND WIFE—PURCHASE BY HUSBAND OF LAND IN WIFE'S NAME—PRESUMPTION OF GIFT—CODE PRESUMPTION OF SEPARATE PROPERTY—BURDEN OF PROOF.—Where land in this state is purchased by the husband in the name of the wife, either with his separate funds or with community funds, the presumption arises that a gift of such land to the wife was intended; and under section 164 of the Civil Code, the presumption is that the title is thereby vested in the wife as her separate property. The burden to overcome such presumption rests upon anyone interested in attacking the wife's title to produce competent evidence of sufficient weight to show that the husband did not intend such property as a gift to his wife.

1D.—ABSENCE OF EVIDENCE OVERCOMING TITLE OF WIFE—SALES AND DISPOSITION OF WIFE'S ESTATE PRESUMED SEPARATE.—In the absence of evidence sufficient to overcome the title of the wife in the property originally acquired by her from her husband's funds, as her presumed separate estate, and in the absence of any further showing of the loss of such title, the presumption is that the proceeds of the sale of his original separate estate continued as her separate estate.

1D.—PROCEEDS OF SALES OF SEPARATE PROPERTIES OF HUSBAND AND OF WIFE—ALTERNATIVE MODE OF DEPOSIT IN BANK—GIFT BY WIFE NOT PRESUMED.—Where a contemporaneous sale was made of the wife's separate property, and of a lot belonging to the husband, and the proceeds of the sale of each was known, the mere fact that all of the proceeds were deposited alternatively in the names of the husband "or" wife did not of itself constitute evidence tending to disprove the presumption that the husband gave to the wife the property from the sale of which her part of such proceeds was derived; neither does such fact, standing alone, show that the wife intended to give to the husband any part of her interest in the land.

ID.—MORTGAGE BY HUSBAND AND WIFE ON HER SEPARATE ESTATE—PRESUMED WANT OF HUSBAND'S INTEREST—PAYMENT OUT OF WIFE'S ESTATE.—Money borrowed on the faith of the wife's separate estate is her separate estate in the absence of a showing to the contrary. The mere fact that the husband joined with the wife in a mortgage loan on her separate estate, at a time when he owned no property, does not indicate that he owned any interest in the mortgage on the property, especially where it appears that such mortgage loan was paid mostly out of the rents and profits of the wife's separate estate, which were her separate property, and that the small residue was paid out of the proceeds of the sale of her separate estate.

ID.—COMMINGLING OF FUNDS—SEPARATE INTERESTS CLEARLY ASCERTAINABLE—PARTIAL TRANSMUTATION SHOWN.—The mere commingling of the funds on deposit belonging to the husband and wife does not render the interest of each party not clearly ascertainable. Where it appears that by investment a part of the proceeds of the wife's separate estate became vested in the husband, and the residue remained in the wife, she is entitled to the whole residue remaining in her as her separate estate, and no part thereof can be claimed by the heirs of the deceased husband.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. W. P. James, Judge.

The facts are stated in the opinion of the court.

Constan Jensen, for Appellant.

Gibson, Trask, Dunn & Crutcher, and Edward E. Bacon, for Respondents.

SHAW, J.—One Charles Heller died intestate, leaving surviving him a daughter, the plaintiff herein, and a widow and two sons, the defendants. The widow was appointed administratrix of his estate and the same, as inventoried, was in due course settled and distributed in accordance with the orders of court. Thereafter plaintiff filed this complaint, alleging that her mother, as such administratrix, had neglected and failed to account for certain property owned by deceased at the time of his death. This property, all of which defendant Louise Heller claims as her separate estate, consisted of \$12,000 cash in bank, household furniture of the alleged value of \$1,000, and an undivided one-half interest in

certain real estate designated as the "West Sixth street property," in all of which plaintiff claimed an interest as the daughter of the deceased. The court found that all of the property involved was the separate estate of defendant Louise Heller and gave judgment accordingly. Plaintiff appeals from this judgment, and from an order denying her motion for a new trial.

While the record discloses upward of fifty specifications of error based upon insufficiency of evidence, the only one necessary to consider in deciding the question involved is the finding that the property described in the complaint did not belong to the estate of Charles Heller, deceased, but was the separate estate of defendant Louise Heller. If this finding is supported by the evidence, other specifications of error based upon like want of evidence, and which are not discussed by appellant, are rendered harmless.

The evidence tends to establish the following facts: Charles Heller and Louise Heller were married in France in the year 1870, emigrating therefrom to Ohio, from which state they removed to California in 1896, bringing with them \$6,000, the proceeds of the sale of real estate purchased in the name of the wife, out of the joint earnings of husband and wife. At the time of their removal certain Ohio real estate standing in the name of Louise Heller was by her deeded to plaintiff, then married and living in Ohio. The \$6,000 brought with them to California was deposited in bank to the credit of Louise Heller. A piece of property located on San Julian street, in the city of Los Angeles, and consisting of a lot upon which there were two storerooms, over which were rooms used as a lodging-house, was purchased for \$8,500, the title thereto being placed in the name of defendant Louise Heller, who paid thereon the \$6,000 which she had in bank, and she and her husband jointly gave their note and mortgage for the balance of the purchase price. This property, it appears, increased rapidly in value. Later, at the request of Charles Heller, the daughter, plaintiff herein, conveyed to him the Ohio property which her mother, Louise Heller, had deeded to her, and which property Charles Heller conveyed to his wife. Louise Heller sold this property for \$1,200, which sum she gave to Charles Heller with which to purchase, in his own name, a small piece of property in the rear of the lodging-

house on San Julian street. The reason she assigns for this act was an expressed wish on the part of Charles Heller to own the property in order to qualify himself for jury service, election officer, etc. The purchase price of this property was \$1,700, and the balance thereof over and above the \$1,200 was secured by mortgage thereon. Mrs. Heller conducted the lodging-house in the San Julian street property for seven or eight years, the proceeds and rents derived therefrom being applied in reduction of the mortgage of \$2,500 originally given to secure a part of the purchase price. On October 24, 1904, the San Julian street property, title to which stood in the name of Louise Heller, together with the small lot in the rear, the title to which stood in the name of the husband, was sold for the sum of \$26,000, \$18,000 of which was cash, and the balance evidenced by note and mortgage executed to Charles and Louise Heller. This money, less \$500 required to pay the mortgage on the husband's lot, and a small sum still unpaid against the wife's lot, was, on the date of the sale, deposited in bank to the credit of "Charles Heller or Louise Heller." Of this sum, \$13,000 was used in the purchase of the West Sixth street property, title to which was taken in the joint name of Charles Heller and Louise Heller. As administratrix, Louise Heller recognized the estate of deceased as the owner of an undivided one-half interest in this property, and the other interest therein, standing in her name, is the real estate involved in this controversy, and which plaintiff insists is not the estate of the mother, but, together with the \$12,000, being the balance of the proceeds of the sale of the San Julian street property and lot in the rear thereof, constituted a part of the estate of Charles Heller.

Counsel for appellant devotes much of his argument in support of the proposition that the property accumulated by the Hellers in Ohio was, under the laws of that state, the separate property of the husband. In so far as the decision of this case is affected by the question, such fact may be conceded. Section 164, Civil Code, provides that, "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." This presumption is indulged in whether the purchase money be the separate funds of the husband, or funds belonging to the marital relation. Funds

of either character are equally the subject of a gift from husband to wife. The property having been conveyed to the wife, the law regards it as her separate estate. No duty devolved upon Louise Heller to prove that it was the subject of a gift, for, since, under the provisions of said section, it is presumed to be her property, "the law, in the absence of evidence to the contrary, presumes the existence of any fact showing the property to have been acquired by her in such manner as to constitute it separate property." (*Killian v. Killian*, 10 Cal. App. 312, [101 Pac. 806]. See, also, *Alferitz v. Arrivillaga*, 148 Cal. 646, [77 Pac. 657]; *Fanning v. Green*, 156 Cal. 279, [104 Pac. 308].) As the purchase money paid for the property was the separate funds of Charles Heller, and a gift thereof being essential to the theory that it was the separate estate of Louise Heller, the law presumes a gift thereof from the husband to the wife. The burden of overcoming such presumption devolved upon plaintiff in attacking the mother's title, and in order to divest the latter's title, plaintiff was required to produce competent evidence of sufficient weight to overcome the presumption that her father intended the property as a gift to his wife, Louise Heller, defendant herein. Little or no evidence was adduced at the trial, the tendency of which was to controvert the rights of Louise Heller in the San Julian street property; and if she owned the property, it necessarily follows, in the absence of some act transmuting the same, that the proceeds of the sale thereof continued as her separate estate.

The mere fact of depositing the proceeds of a subsequent sale of the property in bank to the account of "Charles Heller or Louise Heller" in itself constituted no evidence tending to disprove the presumption that the husband gave to the wife the property from the sale of which such proceeds were derived. Neither does such fact, standing alone, show that the wife intended to give to the husband any part of her interest in such fund. (*Denigan v. Hibernia etc. Society*, 127 Cal. 137, [59 Pac. 389]; *Freese v. Hibernia etc. Society*, 139 Cal. 392, [73 Pac. 172].) Concededly, the husband owned a part of the deposit derived from the sale of his own lot, and as to which sum he was entitled to have it paid out on his order. The record discloses no act of either husband or wife with reference to this deposit which tends to prove that the wife

intended to give the husband her separate funds in the deposit; on the contrary, the conduct of both husband and wife in dealing with the fund so deposited was consistent with a purpose other than so to do. "It should not be held that she intended to part with her title thereto by reason of an ambiguous phrase which is quite consistent with a contrary purpose." (See *Denigan v. Hibernia etc. Society*, 127 Cal. 141, [59 Pac. 389], and cases cited.)

Of the purchase price of the San Julian street property, \$2,500 thereof was evidenced by a note and mortgage, in the execution of which Charles Heller joined with his wife. Upon this fact appellant insists that an interest equivalent to the amount of said note and mortgage was community property. This contention is based upon *Loring v. Stuart*, 79 Cal. 202, [21 Pac. 651], and *Schuyler v. Broughton*, 70 Cal. 285, [11 Pac. 719]. In the latter case it was decided that real property purchased by a married woman in her own name and paid for in part with her separate funds and in part with money borrowed by her for that purpose is in part the separate property of the wife and in part community property. In the case at bar, it appears that the husband at the time of the execution of the mortgage owned, in his own name, no property whatever. The loan was, therefore, made upon the faith of the existing separate estate of the wife. Except a small part thereof paid from the proceeds of the sale, it was paid from the rents, issues and profits of defendant's separate estate which, like the estate itself, was her separate property. (*Diefendorff v. Hopkins*, 95 Cal. 343, [28 Pac. 265, 30 Pac. 549]; *Walsh v. Walsh*, 84 Cal. 101, [23 Pac. 1099].) Under these circumstances, the case must be deemed controlled by the later authorities of *Flournoy v. Flournoy*, 86 Cal. 286, [21 Am. St. Rep. 39, 24 Pac. 1012], and *Heney v. Pesoli*, 109 Cal. 53, [41 Pac. 819], where it is said: "It is rational to conclude that money borrowed upon the separate real estate of one of the spouses will, in the absence of any showing to the contrary, be treated as the separate property of the party owning such real estate." Here there is no showing to the contrary. In support of his contention on this point, counsel for appellant cites at great length the opinion of the court of appeal rendered in the *Estate of Pepper*, 8 Cal. App. Dec. 720. It is but fair to counsel to assume that in thus quoting

from this opinion he was unaware of the fact that the case, after the rendition of such decision, was transferred to the supreme court, which, in deciding the case, and upon the strength of section 163, Civil Code, held that the proceeds of a nursery conducted on land which was the separate property of the husband, and which the court of appeal held to be community property, was likewise his separate estate. (*Estate of Pepper*, 158 Cal. 619, [31 L. R. A., N. S., 1092, 112 Pac. 62].)

It is next insisted that the depositing of the proceeds of the sale of the wife's separate estate with the proceeds of the sale of the lot standing in the name of the husband, conceded to have been funds of the marital relation, constituted such a commingling of the same as to render it impossible to trace and segregate the separate property from that of the community. We perceive no difficulty in this regard for the reason that, upon any theory adopted, it is apparent that a part of the proceeds of the sale of the wife's separate estate was, with the wife's consent, transmuted into community property. The price paid for the property owned by the wife was \$8,500. It increased in value rapidly, and several years after it was purchased a small lot in the rear thereof was bought by the husband for \$1,700, making a total of \$10,200 paid for the two pieces of property. Upon no reasonable hypothesis could the husband's share in the \$26,000, for which the two pieces were sold, have exceeded the proportion which \$1,700 bore to \$10,200, or one-sixth of the whole, amounting to \$4,333, from which, however, must be deducted the mortgage of \$500, leaving a balance of \$3,833. Add to this the additional sum of \$548, which appellant claims Charles Heller had in this deposit, and we have \$4,381 to apply on the West Sixth street property purchased for \$13,000, paid out of the fund, the title to an undivided one-half interest in which, representing \$6,500, was vested in Charles Heller. It thus appears that at his death the \$12,000 deposit left standing in the name of Louise Heller, together with \$6,500 paid for her half interest in the West Sixth street property, constituted a sum much less than the amount received from the sale of her property.

Appellant lays much stress upon the case of *Bekins v. Dieterle*, 5 Cal. App. 690, [91 Pac. 173], wherein a creditor of Bekins sought to enforce a judgment against property which it was alleged Bekins had conveyed to his wife in fraud

of such creditor. While the facts of that case bear no analogy to the case at bar, this court in its opinion said: "The presumption of a separate estate created in Kate Bekins (the wife) by the conveyance from M. Bekins is overcome by the evidence, which clearly shows the property to have been purchased with community funds." The statement was wholly unnecessary to a decision of the case, the sole question involved being whether or not Bekins had made the conveyance in fraud of creditors. It was therefore purely dictum. Such statement is not the law when applied to the facts in the case at bar, and it has been repeatedly so held. (*Killian v. Killian*, 10 Cal. App. 312, [101 Pac. 806]; *Fanning v. Green*, 156 Cal. 279, [104 Pac. 308].) With reference to the furniture of the alleged value of \$1,000, which it is claimed was owned by Charles Heller at time of his death, no evidence was adduced thereon other than a statement of defendant Louise Heller to the effect that there were a few household pieces which she herself bought for the rooming-house and took with her. What they were, the value thereof, or whether or not they had any value, is not made to appear.

We are unable to perceive any merit in the appeal, and the judgment and order are, therefore, affirmed.

Allen, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 24, 1912.

[Civ. No. 906. First Appellate District.—March 27, 1912.]

**AGNES FOX and JOHN L. FOX, Her Husband,
Appellants, v. P. A. ROBINSON, Respondent.**

VENDOR AND PURCHASER—CONTRACT TO SELL LAND—DESCRIPTION—IDENTITY—WARRANTY OF DISTANCE BETWEEN BOUNDARIES—QUANTITY OF LAND.—Where a contract to sell land correctly describes its boundaries, a warranty of the distance between two designated boundaries does not vary or change the identity of the description of the land agreed to be sold. It is only a warranty as to the quantity of the land contained within the description.

ID.—RESCISSION OF EXECUTORY CONTRACT BY VENDEE—FRAUD—BREACH OF WARRANTY—PLEADING.—A vendee may be entitled to rescind an executory contract for the purchase of land, and to a return of the money paid thereon, when such contract was procured by false and fraudulent representations as to the quantity of the land contained within the parcel described, and also when there has been a breach of warranty as to such quantity. But, in such case, the fraudulent representations or the warranty and breach thereof as to quantity must be pleaded.

ID.—COMPLAINT FOR RESCISSION OF CONTRACT BASED ON FAILURE OF TITLE—CLEAR TITLE—VARIANCE—BREACH OF WARRANTY—PROPER JUDGMENT OF NONSUIT.—Where the complaint for rescission of the contract of sale and to recover the purchase money paid thereon correctly describes the land set forth in the contract, and is solely based upon the alleged failure of a clear title thereto in the defendant, but the record shows that the defendant had a clear title to the land described, and shows only a breach of warranty as to the quantity of the land described, as a ground for rescission, it presents a clear case of variance between the complaint and proof, and the court properly granted a judgment of nonsuit.

ID.—AVERMENT OF TENDER AND DEMAND FOR DEED—EVIDENCE—NON-COMPLIANCE WITH LAW—BAD FAITH.—Though the complaint for rescission alleged that plaintiff tendered the balance of the purchase money, and demanded a good and sufficient deed from defendant within ten days, yet where the evidence shows a noncompliance with section 1489 of the Civil Code as to tenders and offers of performance, but merely shows that, without any attempt to find the defendant personally, it was made at his residence during his absence, and also shows that the tender and demand were made in bad faith, with intent to reject any deed complying with the contract, and not conforming to the warranty, and that he subsequently rejected an offer of defendant to reduce the price because of deficiency in quantity, the judgment rendered was clearly warranted.

APPEAL from a judgment of the Superior Court of Alameda County. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

Samuel M. Samter, and W. C. Sharpstein, for Appellants.

Robert Edgar, and Oliver Youngs, Jr., for Respondent.

HALL, J.—This is an appeal from a judgment of nonsuit rendered upon motion of the defendant at the close of the testimony introduced upon behalf of plaintiff.

The only question presented by the appeal is as to whether or not the court erred in granting the nonsuit.

Defendant and plaintiff Agnes Fox entered into a written contract on the twenty-fifth day of September, 1907, in which defendant agreed to sell to said plaintiff, and said plaintiff agreed to buy from defendant a certain piece of land situate in the town of Berkeley, and particularly described in the agreement as set forth in the complaint as follows, to wit: "Commencing at a point on the southerly line of Bancroft Way, distant thereon easterly two hundred (200) feet from the intersection thereof with the easterly line of West street, running thence southerly and parallel with said line of West street fifty (50) feet, more or less, but not less than forty-nine feet, to the center of that strip of land formerly known as South street, thence easterly along the center line of South street fifty-six (56) feet, thence northerly and parallel with said line of West street fifty (50) feet, more or less, but not less than forty-nine (49) feet to the southerly line of Bancroft way; and thence westerly along said line of Bancroft way fifty-six (56) feet to the point of beginning."

The price to be paid was the sum of \$2,200, of which \$200 was paid at the execution of the agreement; and the balance (\$2,000) was to be paid "in monthly installments of ten (\$10) dollars or more on the principal, with interest on balance remaining unpaid each month at the rate of six (6) per cent per annum, but at the end of each year there must be at least \$180 paid on the principal. And more can be paid if he so desires."

Plaintiff went into possession of the premises, or, as she claims, a part of the premises, and so continued until after September, 1909, when she delivered possession of the premises to defendant, and brought this action to obtain a judgment for the sum of \$962.50, being \$750 paid on the purchase price, and \$212.50 expended on the property, and that said agreement be canceled.

Evidence was introduced tending to show that at the time the agreement of sale was executed the boundaries of Bancroft way were not marked upon the ground, that it was in appearance simply a country road. Subsequently it was graded and macadamized. Plaintiff procured the city surveyor of Berkeley to make a survey of the lot in question, who gave testimony at the trial, which it may be conceded for the purposes of this opinion established, or at least tended to establish, the fact that the distance from the southerly line of Bancroft way along the easterly boundary of the lot described in the agreement to the center of the strip of land formerly known as South street was but 47.63 feet, and the distance between said southerly line of Bancroft way, along the westerly boundary of said lot, to the center line of said strip of land formerly known as South street was but 48.17 feet. It was and is the theory of appellant that the facts thus shown established a failure of a clear title to the land described in the agreement, which entitles her to recover the money paid under the agreement, and to a judgment canceling said contract. She accordingly alleged in her complaint "That said defendant is unable to execute and deliver to said Agnes Fox a good and sufficient deed conveying the land in said exhibit 'A' described free and clear of all encumbrances."

We think the theory of appellant is founded upon a misconception as to the correct construction of the agreement, and the effect of the words therein contained "but not less than forty-nine (49) feet." The land in the agreement as pleaded in the complaint is described as bounded on the north by the southerly line of Bancroft way, and on the south by the center line of a strip of land formerly known as South street. Those lines, so far as the description of the land agreed to be sold is concerned, are controlling over the words indicating the distance between those lines. The words "but not less than forty-nine (49) feet" following the words "fifty

(50) feet more or less," were intended to have, and did in fact have, the effect of a warranty that the distance between those lines was not less than forty-nine feet.

It is clear from the language of the agreement as pleaded that plaintiff only intended to buy and defendant only intended to sell a piece of land bounded on the north by the southerly line of Bancroft way, and on the south by the center line of the strip of land formerly known as South street. The defendant in the agreement did warrant that the distance between those two designated boundaries was at least forty-nine feet, but this warranty did not vary or change the identity or description of the land agreed to be sold. It was but a warranty as to the quantity of land contained within the description.

It is correctly stated in appellant's brief that "the insertion of the words 'but not less than 49 feet' was a warranty that the east and west sides were at least forty-nine feet in length." Plaintiff's complaint, however, was not framed upon the theory of a breach of warranty as to the distance between the given boundaries, but upon the theory of a failure of a clear title to the land described in the agreement.

It is not doubted that a vendee may be entitled to a rescission of an executory contract, and to a return of money paid thereon, when such contract was procured by false and fraudulent representations as to the quantity of land contained within the parcel described, and also where there has been a breach of warranty as to such quantity. (*Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 628, [100 Pac. 117]; *Quay v. Scher*, 136 Cal. 406, [69 Pac. 96]; Civ. Code, sec. 1786; *Brooks v. Riding*, 46 Ind. 15; *Stevens v. Giddings*, 45 Conn. 507; *Davis v. Nugam*, 72 Wis. 439, [1 L. R. A. 774, 40 N. W. 497]; *Moore v. Harmon*, 142 Ind. 555, [41 N. E. 599].) But in such case the fraudulent representations or warranty and breach as to quantity must be pleaded. Such was the rule followed in each of the cases last above cited.

Proof either of false representations as to the quantity of land contained in the parcel described, or of a breach of a warranty as to the quantity, will not sustain a claim of failure in title to the land described.

In the case at bar the boundary lines of the land contracted to be sold were correctly described. Only the land within

those lines was intended to be sold. Defendant had a clear title to all the land within those boundary lines, and could give a clear title thereto. The record simply shows a breach of a warranty as to the quantity of land described in the agreement, and not a failure of title to any portion of the land described and agreed to be sold. It presents a clear case of a variance between the allegations of the complaint and the proof. For this reason the court did not err in granting the judgment of nonsuit. (*Baily v. Brown*, 4 Cal. App. 515, [88 Pac. 518]; *Tomlinson v. Monroe*, 41 Cal. 95; *Elmore v. Elmore*, 114 Cal. 516, [46 Pac. 458].)

In holding that for the reasons above set forth the court did not err in granting the nonsuit, we have not overlooked the allegation in the complaint to the effect that plaintiff made a tender of the balance of the money unpaid, and demanded of the defendant that he execute and deliver to plaintiff within ten days after the first day of September, 1909, a good and sufficient deed conveying to said plaintiff the parcel of land in said exhibit "A" described.

The evidence as to this so-called tender does not show a compliance with the provisions of the statute relating to tenders or offers of performance.

Appellant went to the residence of defendant in his absence and made the tender to his wife, and left a written notice for defendant. No attempt was made to show that defendant could not have been easily found. Appellant simply went to his residence upon one occasion, ascertained that he was not then at home, and proceeded to make the alleged tender. This was not a compliance with the law. (Civ. Code, sec. 1489.)

Furthermore, it is perfectly clear from the entire record that this so-called tender was not made in good faith, that appellant was not willing to perform, that is to say, if defendant had been present and had offered her his deed of the land, describing it as in the agreement it is described, she would not have accepted the deed or paid the money.

An offer of performance must be made in good faith (Civ. Code, 1493); and is of no effect unless the person offering to perform is willing to perform according to the offer. (Civ. Code, sec. 1495.)

The real purpose and intent was to reject any deed because the lot was not forty-nine feet in depth. It may be noted that

defendant, because of this deficiency in the quantity of the land, offered to abate \$100 from the price. This offer appellant refused.

The judgment must be affirmed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1078. Second Appellate District.—March 29, 1912.]

HARRIET O. MATTERN, Respondent, v. G. EDWIN ALDERSON, Respondent, and J. C. ANDERSON, Appellant.

ACTION TO RESCIND CONTRACT TO EXCHANGE LAND—FRAUDULENT REPRESENTATIONS—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE—CONCLUSIVENESS UPON APPEAL.—In an action to rescind a contract to exchange land on the ground of the fraudulent representations of the defendants as to the value of their property exchanged for that of the plaintiff, where the findings and judgment were for the plaintiff and against the defendant appealing, and there is some evidence in favor of the plaintiff, and the evidence is conflicting, the decision of the trial judge thereon is conclusive upon appeal.

ID.—INCOMPETENT EVIDENCE AS TO MARKET VALUE OF PROPERTY INVOLVED IN EXCHANGE.—A question as to what the plaintiff paid for her property was properly excluded as incompetent to prove its market value, and the court properly excluded nonexpert evidence as to the value of plaintiff's property, and also properly excluded advertisements in newspapers and public reports tending to show an exciting condition of the real estate market as affecting the defendant's property offered in exchange, as not being competent evidence as to its value, and also properly disallowed proof by the defendant as to the value of any property not involved in the exchange.

ID.—NEWLY DISCOVERED EVIDENCE—INSUFFICIENT EXCUSE FOR NONPRODUCTION.—If it be conceded that newly discovered evidence offered as a ground for a new trial is material, yet where no sufficient showing appears why such evidence was not produced at the trial, it being additional evidence of a witness who testified at the trial, it cannot be held that the court erred in denying the motion.

ID.—PROPER RELIEF AS TO BILL OF EXCEPTIONS—REVERSIBLE ERROR NOT SHOWN.—It is held that the court properly allowed a bill of

exceptions to be settled for use on the motion for a new trial, after the time limited, upon the showing of a sufficient excuse under section 473 of the Code of Civil Procedure, though upon a careful scrutiny thereof it discloses no reversible error.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

J. Vincent Hannon, and Hannon & McCormick, for Appellant.

Murphy & Poplin, for Plaintiff-Respondent.

JAMES, J.—Action to enforce rescission of a contract for an exchange of real property predicated upon alleged fraudulent representations made by defendants. In February, 1907, plaintiff was the owner of a half section of land in the county of San Bernardino of the alleged value of \$8,000. Alderson was a real estate agent and offered to secure for plaintiff in exchange for her property certain lots of land at Vineland in Los Angeles county. The exchange of properties was finally consummated, the plaintiff receiving, in addition to the Vineland lots, thirty-seven shares of the capital stock of a corporation called the Toledo, Columbus and Cincinnati Railway Company. In her complaint she alleged that Alderson and Anderson had conspired together to cheat and defraud her, and that they had represented that the Vineland lots were of the value of \$6,125, less an encumbrance of \$1,825, then a lien thereon, and that the shares of stock were reasonably worth the sum of \$3,700. She alleged, further, that the stock was valueless, and that the real property received by her as a part of the consideration for the exchange was not worth in excess of \$1,825, that being the amount of the encumbrance against it. In the complaint it was further set forth that the fact that the representations as to the value of the Vineland lots and the shares of stock were untrue was not discovered until the first day of March, 1908, and that on April 1, 1908, plaintiff served a written notice rescinding the contract of exchange. The trial court found the issues generally in favor

of plaintiff and a decree was entered accordingly. From the judgment and from an order denying a motion made by him for a new trial, defendant Anderson appeals.

As to many of the facts found by the court, appellant contends that there was no sufficient evidence upon which to found such findings, but, without particular reference to each specification, the objections so made may be briefly disposed of. A careful examination of the testimony as set out in the record discloses that there was some evidence before the trial judge tending to prove all of the facts found against appellant, and this being the state of the case, this court has not the privilege of questioning the correctness of those conclusions. Counsel's argument is largely by way of contending that the preponderance of the evidence was in favor of their client. It was the duty of the trial court to determine the questions of fact, and the evidence being conflicting, its decision thereon is conclusive upon this court. A number of exceptions were taken to the rulings of the court made during the course of the trial. In our opinion, the court did not err in sustaining an objection to a question asked the plaintiff as to what she paid for her property, as that question was incompetent as tending to prove the market value of the real estate. Appellant was not hindered in any proper effort made by him to prove the value of either the property of plaintiff, or the property given in exchange therefor, and all of the questions to which objections were sustained relative to advertisements in newspapers and public report tending to show an excited condition of the real estate market at the time of the exchange as affecting the Vineland property had for their purpose the eliciting of evidence not competent to establish market values. Neither was it competent for the defendant to prove, as he offered to prove, the value of property other than that involved in the transaction of exchange. The witness Broadwell, who was not permitted, upon an objection by plaintiff, to give his opinion as to the value of plaintiff's property, did not, as the trial court held, show that he was familiar with the market value thereof. It was, therefore, proper to sustain that objection on the ground that no sufficient foundation had been laid to entitle the witness to give his opinion on the question of value. The alleged newly discovered evidence, which was offered in support of one of the grounds of the

motion for a new trial, was that of a witness who had testified at the trial on behalf of appellant, and who, it was alleged, had discovered some further correspondence had with the husband of plaintiff. Conceding that this testimony would have been material, and that it might have changed the conclusions of the trial court upon the issues, sufficient excuse did not appear to show why this evidence could not have been produced at the trial. In denying the motion for a new trial on this ground the trial court did not err.

Respondent objected to the consideration of the statement prepared for use on the motion for a new trial on the ground that the trial court committed error in settling a bill of exceptions of the appellant as to the proceedings had upon the hearing of that motion, which bill of exceptions was settled after the time fixed by the statute for the settlement of the same. Appellant, however, in our opinion, did present to the trial judge sufficient excuse warranting the relief afforded him under the provisions of section 473, Code of Civil Procedure, in this regard.

The judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.

[Crim. No. 233. Second Appellate District.—April 1, 1912.]

**In the Matter of the Application of JOHN F. ANDERSON,
for Writ of Habeas Corpus.**

MUNICIPAL ORDINANCE—STANDING OF CARRIAGES ON STREETS—HABEAS CORPUS—ALLEGED UNCONSTITUTIONALITY NOT APPARENT—REMAND TO CUSTODY.—Where a petitioner for a writ of *habeas corpus*, who has been held for a violation of a city ordinance regulating the standing of carriages on the streets of the city, having made default in the payment of a fine for its violation, assigns as a ground for discharge that the ordinance is unconstitutional and void, but has filed no brief, and cited no authority for his contention, it is held not the duty of this court to seek for some reason for his discharge on the ground proposed, and where from an inspection of the ordinance it discloses no apparent infirmity, the petitioner will be remanded to the proper custody.

ID.—APPROPRIATE ACTION OF COURTS ON QUESTIONS OF CONSTITUTIONALITY.—Courts will not hold statutes or ordinances unconstitutional unless it is clearly shown that they are inconsistent with the fundamental law.

APPLICATION for discharge upon writ of *habeas corpus*.

The facts are stated in the opinion of the court.

J. G. Rossiter, for Petitioner.

William J. Carr, for Respondent.

JAMES, J.—Petitioner herein, after having been convicted of violating an ordinance of the city of Pasadena designed to regulate the standing of public carriages on the streets of said city, and after having been imprisoned in default of payment of a fine imposed by the police court, petitioned for release upon *habeas corpus*. In his petition he assigned as ground thereof that the ordinance under which his conviction was had is unconstitutional and void. Although time was allowed petitioner within which to file a brief and point out wherein the provisions of the ordinance are in conflict with the constitution, no brief has been filed and no authorities cited in support of the petition. We conceive it not to be the duty of this court to seek for some cause which shall result in nullifying the ordinance on the ground proposed by petitioner. An inspection of the ordinance does not disclose any apparent infirmity of the kind suggested, and with that conclusion we shall rest content, unless differently convinced in a case where the contentions here made are supported by argument or authority. Courts will not hold statutes or ordinances unconstitutional unless it is clearly shown that they are inconsistent with the fundamental law. (*Deyoe v. Superior Court*, 140 Cal. 476, [98 Am. St. Rep. 73, 74 Pac. 28].)

The writ is discharged and the prisoner remanded to the custody of the chief of police of the city of Pasadena.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 933. Third Appellate District.—April 1, 1912.]

THOS. MANNIX, Respondent, v. A. W. WILSON,
Appellant, and J. W. MITCHELL CO., Defendant.

MECHANIC'S LIEN—FORECLOSURE—PLASTERING—DEFENSE OF UNREASONABLE DELAY—SUPPORT OF FINDING.—In an action to enforce a mechanic's lien against the owner of a building for the plastering done by the plaintiff, where the answer pleads unreasonable delay in the prosecution of the work, by which plaintiff was damaged in the loss of rents, it is held that a finding against such unreasonable delay on plaintiff's part is sustained by evidence that any delay was caused by others over whom the plaintiff had no control, and that the work was begun as soon as the building was in readiness for lathing and plastering, and was accomplished with diligence thereafter.

ID.—INADMISSIBLE EVIDENCE—CONTRACT AND SPECIFICATIONS—DELAY OF CONTRACTOR IN COMPLETION OF BUILDING.—The contract and specifications were not admissible in such action to foreclose the plasterer's lien, for the purpose of showing that the contractor was liable to the owner, under the terms of the contract, for all loss and damage resulting from his delay and failure to complete the building within the time designated in the contract, although such contract would be valid as between the contractor and the owner.

ID.—DEDUCTION OF DAMAGES TO OWNER FROM LAST PAYMENT NOT ALLOWABLE AGAINST LIEN CLAIMANTS — CONSTITUTIONAL RIGHT PROTECTED.—The right of the owner to deduct stipulated damages as against the contractor cannot be allowed as a deduction from the last payment, to the injury of lien claimants, whose right to liens are guaranteed by the constitution and protected by the legislature, especially as regards payment of such liens out of the last payment of twenty-five per cent of the contract price; and to permit that fund to be sequestered in the interest of the owner as against the contractor would be to deprive lien claimants of their constitutional right to enforce their liens.

ID.—SEQUESTRATION OF FUND BY NOTICE — SETTLEMENT WITH CONTRACTOR AT PERIL.—Where plaintiff, when there was \$7,000 unpaid on the contract served a notice upon the owner to withhold therefrom the full amount of his claim for plastering, pursuant to section 1184 of the Code of Civil Procedure, the owner was thereby required to sequester therefrom sufficient money fully to meet the plaintiff's demand, and any money that might be necessary to meet any claim of lien which might be filed therefor; and where the owner settled with the contractor without reserving sufficient money to meet the plaintiff's demand, he did so at his peril.

ID.—SETTLEMENT WITH CONTRACTOR INCLUSIVE OF ALL CLAIMS EXCEPT PLAINTIFF'S—ABATEMENT NOT ALLOWABLE.—Where the settlement by the owner with the contractor included a settlement of all claims against the owner, with the exception of the plaintiff's claim, it must be presumed that the owner was allowed, as against the contractor in such settlement, all that he was entitled to, including all claim he might have for a reduction of the contract price in consequence of delay; and after such full settlement of all other claims the owner cannot urge any abatement of the plaintiff's claim.

ID.—ACCEPTANCE OF BUILDING FROM CONTRACTOR—WAIVER OF DAMAGES FOR NONPERFORMANCE.—The acceptance of the building by the owner from the contractor, in the absence of any showing of fraud or mistake, implies a waiver of any claim for damages against the contractor by the owner, on account of the nonperformance of the contract in any particular.

ID.—OWNER BY SETTLEMENT UNCONDITIONAL GUARANTOR OF CONTRACTOR'S OBLIGATION TO PLAINTIFF.—The owner by the settlement with the contractor became an unconditional guarantor of the contractor's obligation to pay the plaintiff for his work, his liability being co-extensive with that of the contractor to the plaintiff. In the absence of any defenses existing between the contractor and the plaintiff and of any fault on the part of the plaintiff, the owner is liable to him for the debt.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Dorn & Dorn & Savage, for Appellant.

Roger Johnson, for Respondent.

BURNETT, J.—The original complaint, as stated by respondent, set forth a cause of action for the foreclosure of a mechanic's lien upon the property therein described, for plastering the building thereon, under a contract between respondent and the original contractor, one J. W. Mitchell, and also against the owner, appellant Wilson, personally, on a "stop notice" served upon him pursuant to section 1184 of the Code of Civil Procedure. By a subsequent amendment another cause of action for the same debt is alleged against appellant, on a written guaranty which appellant gave re-

spondent for the payment by said Mitchell of the contract price of said plastering. No question is raised, nor indeed could be, as to the sufficiency of the complaint, and the only issue presented by the answer which can be considered here is found in the averment that "plaintiff hindered and delayed the said work, and did not prosecute the same with reasonable or any diligence, but unreasonably and without any valid excuse therefor did so negligently and slothfully perform the same and so neglected the performance of and hindered and delayed the same, that the same was not completed by him until sixty days subsequent to the time when the same should have been completed by him and when the same would have been completed by him had he not delayed the work as aforesaid and had he prosecuted the same with reasonable diligence," and that thereby appellant was damaged by loss of rents to the extent of \$2,840. The finding of the court directly negatives these allegations in the answer and, outside of a single ruling upon offered evidence, to be hereafter noticed, it is apparent, from the record, that the only matter for adjudication here is as to the sufficiency of the evidence to support said finding.

As to this there can be no serious controversy. Indeed, it is strange that the question should be raised at all. It may be said that the testimony for appellant in this respect is so equivocal and uncertain as to hardly create even a conflict. The contract involved herein was executed September 2, 1908. It is apparent that the lathing and plastering could not be done until the building was made ready for it. It does not appear definitely when the building was ready for respondent's work. Appellant testified that he thought that a month before respondent started to work he notified the latter that the building was ready for him, but furthermore he testified: "He didn't start his work before away back in September. . . . I could safely say he delayed in starting work after I had notified him that it was ready for him for thirty days. It was at least two or three weeks. It was fully a month. . . . I notified him to commence work the beginning of July, I think it was . . . ; he commenced to make his mortar two or three weeks afterward. . . . He commenced plastering about August 13th. No, I don't think he commenced plastering until about September 1st. . . . I think he started in to

plaster between the 1st and 15th of September—no, between the 15th of September and the 1st of October.” His other witness, the architect, also testified: “I don’t remember the date when Mannix commenced the work. I should judge some time during the month of September.” Furthermore, he said: “A plastering contractor mixes his mortar first, which takes some time. Then that mortar must lay for ten or twelve days so it will become aged.” As to this asserted delay of thirty days in beginning the work it is therefore apparent that the question was at least left in doubt by the testimony of appellant’s witnesses.

Turning, however, for support of the challenged finding, to the evidence, which under the established rule requires of us full credit, we may adopt the epitome furnished by respondent, as follows: Mannix says that when Wilson notified him to commence work he went to the building and found it was not ready for plastering, but he commenced to mix his mortar on the street and was stopped by a policeman, which occasioned a delay of about two days. There was not room to mix it in the basement, because it was full of rubbish and carpenter stuff and they had men there getting it ready to plaster. When the architect called on him to commence plastering the building was not ready. Neither the front nor back stairway was up; the electric wires had not been inspected and his work went over them; the carpenters’ work on the first floor was improperly done and Wilson made him do it over afterward. “I proceeded just as soon as the work was ready and continued it as quick as it could be done.” One Ziegler did the lathing, and “I started him as soon as he could get to work and followed it up with the plastering.” Furthermore, plaintiff testified that he talked with appellant at different times and that the latter said, “Of course he had to pay the bill; he knew he had to pay the bill; he knew he had to pay it, and he did not complain about the character of the work or about any delays, and he said that he was ready to pay as soon as the affair could be settled up.” The testimony of plaintiff as to the progress of the work is also corroborated by two of the lathers, who made clear the fact that any unwarranted delay in the plastering was not at all the fault of respondent. It seems idle to pursue the subject any further or to argue—what certainly will not be disputed—

that respondent was not responsible for delays caused by those over whom he had no control and with whom he sustained no contractual relations.

The only ruling which is assailed is exhibited in the transcript as follows: "The defendant thereupon offered in evidence the original plans and specifications and contract between A. W. Wilson and J. W. Mitchell. . . . Counsel for defendant Wilson stated that said contract was offered in evidence to show that Mitchell was required by it to complete the building within one hundred working days after June 22, 1908, and that in case of his failure so to do that he should be liable to the owner for all loss and damage arising by reason of such delay, to which introduction of said evidence the plaintiff objected, upon the ground that the same was immaterial, irrelevant and incompetent, and was a contract between Mitchell and Wilson and not binding upon Mannix except so far as it was made so by his agreement." The objection was sustained.

The question may be considered from several viewpoints, and from each we shall discover that the said ruling was either justifiable or innocuous. One of these is set forth perspicuously by Mr. Justice Henshaw in the case of *Hampton v. Christensen*, 148 Cal. 729, [84 Pac. 200]. Therein it is said: "It is a perfectly legal contract which makes time of completion of its essence, and provides that the contractor, for a failure to perform in time, shall make good to the owner such loss as the latter may sustain thereby. More than this, it is a deduction or offset which, but for the lien law, the owner would have the unquestioned right to claim from the amount found due the contractor under the contract. . . . But the right of materialmen, artisans and laborers of every class is to have a lien upon the property upon which they have bestowed their labor or furnished their material for the full value of the same, and this right is one solemnly guaranteed them by the constitution of the state. (Art. XX, sec. 15.) The legislature is enjoined to pass laws for the speedy and efficient enforcement of these liens. . . . It will be noted that, in framing these laws, primarily designed for the protection of materialmen and laborers, the legislature has seen fit to reserve for the use of these lien claimants but one of the payments. . . . Whatever may be said of other payments, this amount of

money [the twenty-five per cent to be set aside for the lien claimants] cannot lawfully be depleted or reduced to the injury of any such claimant. If it could be, it would be setting at naught the constitutional provision granting a lien for the full value of the labor done or material furnished." The opinion proceeds to point out how the owner may protect himself against the derelictions of the contractor, and it is declared that "we hold that the excess of such demand cannot be carried over and made a charge against the twenty-five per cent final payment, to the injury of any lien claimant thereon; for, as has been said, since this final payment is the only fund which the legislature has sequestered to meet the demand of the lien claimants, to permit this would be to deprive them of their constitutional right to a lien." The application of this principle to the situation here is simple. The pleadings admit a contract between Wilson and Mitchell for \$45,500, of which twenty-five per cent was required to be withheld to satisfy lien claimants, viz.: \$11,375. The building was completed and accepted and notice of acceptance filed about February 9, 1909. This \$11,375 could not lawfully be paid for any other purpose than to satisfy lien claimants, for at least thirty-five days thereafter, which would bring it to March 16, 1909. Plaintiff's lien was filed March 5, 1909, and the evidence shows that a settlement was made with all the other claimants. It is perfectly manifest, therefore, that the necessary portion of this \$11,375 must be applied to the satisfaction of respondent's claim, regardless of whatever demand might exist in favor of appellant against the contractor by reason of the latter's failure to complete the building within the time provided.

Again, it is admitted that respondent, on February 2, 1909, served a notice upon the owner pursuant to section 1184 of the Code of Civil Procedure, and also that, subsequently, in the completion and acceptance of the building, there was due on the completed payment from Wilson to Mitchell the sum of about \$7,000. Said section provides that "Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be fur-

nished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter." Therefore, the owner was required to sequester this amount and hold it to meet respondent's demand; but, notwithstanding this notice, the evidence shows that appellant settled with the contractor, Mitchell. It is too plain for argument that he did so at his peril, and that, under the circumstances detailed, his asserted claim for damages against Mitchell cannot be permitted to impair or offset the availability of said sequestered fund for the payment of respondent's claim. (*Hampton v. Christensen*, 148 Cal. 729, [84 Pac. 200].)

But the settlement with Mitchell is a complete answer to appellant's contention. The latter's testimony is: "There were other subcontractors on the building. I settled with all the rest except Mannix. Some got sixty per cent and some got more, I think. I also settled with Mitchell." His settlement with Mitchell, of course, included whatever claim he might have for a reduction of the contract price in consequence of said delay. We must presume that appellant was allowed whatever he was entitled to. Suitable allowance having been made by the contractor, manifestly the owner could not urge an abatement therefor from the just claim of respondent.

Moreover, the acceptance of the building, in the absence of fraud or mistake, neither of which is urged, implies a waiver of any claim for damages on account of nonperformance in any particular. (*Moore v. Kerr*, 65 Cal. 519, [4 Pac. 542]; *Baltimore etc. Ry. Co. v. Scholes*, 14 Ind. App. 524, [56 Am. St. Rep. 307, and cases collected in note, 43 N. E. 156].)

Finally, appellant was an unconditional guarantor of the obligation of Mitchell to pay respondent for his work. His liability is, therefore, coextensive with that of the principal obligation. It is no doubt true, as asserted by appellant, that "Wilson, in assuming Mitchell's liability to Mannix, acquired thereby all defenses and claims which Mitchell might assert against Mannix, and it cannot be said that Wilson has waived any defenses or that he is estopped from asserting them. (1 Brandt on Suretyship and Guaranty, secs. 255, 259; 20 Cyc. 1487.)" But Mitchell could not urge his own failure to comply with the contract as a defense against the claim of respondent, and the court has found, as we have seen, upon

sufficient evidence that there was no fault upon the part of Mannix. It follows necessarily that appellant is liable for the debt regardless of the said ruling of the court.

In any view that we may take of the case we can see no merit in the appeal, and the judgment and the order denying the motion for a new trial are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 926. Third Appellate District.—April 2, 1912.]

JAMES I. NELSON, Appellant, v. ANNA MAY NELSON,
Respondent.

ACTION FOR DIVORCE BY HUSBAND — CROSS-COMPLAINT BY WIFE — EXTREME CRUELTY — ELEMENT OF WRONGFULNESS ESSENTIAL — NECESSARY IMPLICATION SUFFICIENT.—While, in a cross-complaint by the wife, in an action for a divorce by the husband, seeking a divorce from him on the ground of his extreme cruelty, the element of *wrongfulness* involved in the definition of "extreme cruelty" set forth in section 94 of the Civil Code must appear from its allegations, yet the cross-complainant is not required to adopt the precise language of the statute; but it is sufficient that the only rational inference from the acts of extreme cruelty specified and described in the cross-complaint involves the necessary implication of *injustice or wrongfulness* on the part of the plaintiff.

ID.—SUFFICIENCY OF CROSS-COMPLAINT—SHOWING OF "GRIEVOUS PHYSICAL AND MENTAL SUFFERING."—Where the cross-complaint alleges that the plaintiff had treated the defendant "with extreme cruelty," which is followed by a specification of acts which necessarily imply unlawfulness, cruelty and brutality, and culminates in the positive averment that by reason of those acts specified the defendant and cross-complainant has suffered and does suffer great and grievous physical and mental suffering, it presents a clear case of the "wrongful infliction of grievous bodily injury and grievous mental suffering," within the meaning of section 94 of the Civil Code.

ID.—FINDINGS — STATUTORY REQUIREMENT — JUDGMENT FOR CROSS-COMPLAINANT UNSUPPORTED BY GENERAL FINDINGS.—To satisfy the requirement of the law as to findings under a charge of extreme cruelty, there must be found at least some of the acts of cruelty specifically charged and embraced within the evidence, and also that these acts wrongfully inflicted upon the complainant grievous bodily

injury or grievous mental suffering; and where the findings for the cross-complainant are merely of a vague and general character, without specifying acts of extreme cruelty alleged and proved, they are insufficient to support a judgment for the cross-complainant.

ID.—ALLEGATIONS OF CROSS-COMPLAINT NOT ADMITTED BY FAILURE TO ANSWER.—None of the allegations of the cross-complaint for a divorce by the wife against the husband, constituting the grounds and conditions of divorce, are admitted by the failure of the husband to answer the same; but they must be substantially proved and found. A cause of action for a divorce must always be proved and found, and cannot be taken by default or admission. It constitutes a statutory exception, under section 130 of the Civil Code, to the general rule that facts not denied need not be found.

APPEAL from a judgment of the Superior Court of Sonoma County. Thos. C. Denny, Judge.

The facts are stated in the opinion of the court.

S. K. Dougherty, for Appellant.

T. J. Butts, for Respondent.

BURNETT, J.—This is an appeal by plaintiff from an interlocutory judgment of divorce awarded defendant upon her cross-complaint. Appellant declares that "Whether the cross-complaint herein states a cause of action, or whether the findings made upon it support the judgment for the defendant, are the two principal points made by appellant on this appeal." The alleged insufficiency of said cross-complaint is predicated of the failure to aver that the acts of cruelty set out *wrongfully* inflicted upon defendant *grievous* mental suffering, and the findings are assailed for a similar omission.

Of these, in the order presented by appellant in his brief. Section 94 of the Civil Code defines "extreme cruelty" as being the "wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." Appellant is, therefore, right in his contention that the element of *wrongfulness* must appear in the complaint. It would, of course, be unreasonable to hold that every infliction of grievous bodily injury or mental suffering should be a sufficient ground for divorce. Such injury or suffering might result from the inadvertent or justifiable con-

duct of the other party to the marital relation. The law does not, manifestly, contemplate such a contingency but properly demands that the deprecated act be wrongful. We do not understand, however, that the pleader is required to adopt the exact language of the statute. It is sufficient if, by appropriate averments, the said qualification appears. Here, we think, the only rational inference from the allegations of the cross-complaint is that the "infliction" was "wrongful." The acts of extreme cruelty are specified, and they are described in such terms as to carry necessarily the implication of *injustice* or *wrongfulness* on the part of plaintiff. For instance, it is averred that, on one occasion, plaintiff said to defendant, "Get supper early and we will go to the dance to-night"; that defendant went home and, after doing her housework, got ready to go to the dance, and when she started to go he seized her violently by the arm and, in an angry voice, uttered an oath and said to her, "You're not going to take that baby out," and shoved her back into the house and seized her by the throat and choked her until their little son struck him, when he desisted, and, at the same time, he accused her of wanting to go to the dance to meet one Bishop. It is further alleged that plaintiff, while away from home, on two separate occasions, contracted a venereal disease for which he was under the care of a physician for many months, and that he falsely accused defendant of having given him said disease; "that in the month of June, 1910, the plaintiff told the defendant that someone had placed a deer hide in his barn and then and there said to defendant, 'Damn you, you know more about this deer business than you have told; I will shoot Bishop and you too'"; that the charges of adultery made in plaintiff's complaint are without foundation, and were made by said plaintiff for the purpose of injuring the good name of defendant with her neighbors and friends, and that in his complaint he "has falsely and willfully charged this defendant with the crime of conspiracy committed with one Martin Bishop against the said plaintiff, which said accusation is false and untrue, and was made by the said plaintiff for the purpose of humiliating and injuring the good name and reputation of this defendant with the general public and with her friends and neighbors." It seems to us apparent that the addition of the qualifying word "wrongfully" is not required

in order to stamp with that characteristic the foregoing acts as thus detailed in the cross-complaint. If used, it would have constituted a mere redundancy.

The criticism of the pleading as to the other point, we think, is equally destitute of merit. In paragraph 9 it is alleged, "That for five years last past the said plaintiff has by a uniform course of conduct been cruel to defendant and has inflicted upon her through his harsh and ungentlemanly conduct great mental cruelty." The contention is that *great* is not equivalent to *grievous*. We may pass this, however, as, in paragraph 12, we have the following allegation: "That by reason of said acts and conduct on the part of said plaintiff, said defendant has suffered and still does suffer great and *grievous* physical and mental suffering." Appellant seeks to limit the application of this to a portion of the asserted acts of cruelty but no such arbitrary construction is admissible. "Said acts and conduct" grammatically comprehends the complete picture of plaintiff's dereliction that appears in the cross-complaint.

Summarizing, then, on this branch of the case, we have, in the said pleading, a general allegation that plaintiff has treated defendant "with extreme cruelty," followed by a specification of acts that necessarily imply unlawfulness, cruelty and brutality, and culminating with the positive averment that by reason of these acts "defendant has suffered and still does suffer great and grievous physical and mental suffering." If this does not present a case of "the wrongful infliction of grievous bodily injury or grievous mental suffering," we have totally misconceived the language employed. The cases cited by appellant are in harmony with what we have said. For instance, in *Smith v. Smith*, 124 Cal. 651, [57 Pac. 573], it is held that "A complaint which merely alleges that defendant has treated the plaintiff in a cruel and inhuman manner, that he has applied coarse epithets to her which are described, and has accused her of a want of chastity without alleging either grievous bodily injury or grievous mental suffering as the result of the cruelty alleged does not state a cause of action." It is grounded upon the position that "grievous bodily injury or grievous mental suffering is the ultimate fact and should be alleged." No such omission, as we have seen, is found here.

If there was any defect in the cross-complaint, it constituted only what could be reached by special demurrer. No demurrer, however, was interposed, nor was the cross-complaint answered by plaintiff, and this latter consideration is urged by respondent as a sufficient reply to appellant's contention as to the incompleteness of the findings.

It is no doubt well settled, as a general rule, that facts averred in the complaint and not denied in the answer are not required to be found by the court. (*Fox v. Fox*, 25 Cal. 587; *Grossini v. Perazzo*, 66 Cal. 545, [6 Pac. 450]; *Walker v. Brem*, 67 Cal. 599, [8 Pac. 320]; *Johnson v. Vance*, 86 Cal. 110, [24 Pac. 862].) But the reason is that there is no fact in issue and therefore no fact to be proved. Wherever a fact is to be established by evidence, however, the rule is different. This is indicated clearly enough by section 632 of the Code of Civil Procedure. It provides that "Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." Ordinarily, there would be no "trial of a question of fact" where the fact is admitted by the failure to deny it, but where the asserted fact is the ground upon which a party relies for divorce, it must be established as though denied, since "no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties," etc. (Civ. Code, sec. 130.) This must be taken into account in connection with section 131 et seq., providing that "In actions for divorce, the court must file its decision and conclusions of law as in other cases," etc.

It is true that the *Fox* case, *supra*, was an action for divorce, but the allegation therein, not denied, related to the fact of marriage, and it was held that no proof was required of this, since "the marriage is in no sense a ground for the divorce," and that proof was required by the statute only "of the facts alleged as the grounds for a divorce." The court, therefore, through Mr. Justice Rhodes, said: "The fact of the marriage is fully established by the defendant's failure to deny it in her answer, and that is equivalent to the most direct proof." It was accordingly determined that there was no necessity for a finding of the fact of marriage, the court saying: "That

fact was not in issue between the parties, and therefore was not required to be found by the court."

In *Bennett v. Bennett*, 28 Cal. 600, a question of finding was not involved, but it was claimed that it was not necessary to prove the fact of residence, since it was not denied, and the Fox case was cited as authority for the contention. The supreme court held, though, that there is a marked distinction between the fact of *marriage* and of *residence*, stating that "residence, though it does not enter into the statute causes of divorce, does enter into the 'grounds' of divorce, or constitutes, rather, the sole ground upon which a decree dissolving the marriage relation in any given instance can be regarded otherwise than as a piece of judicial usurpation. But over and beyond this, residence is palpably within the mischiefs against which it was the object of the statute to guard, and therefore it must be proved."

We conclude that, since it was incumbent upon defendant to prove the alleged facts upon which she relied for a divorce, they should be embraced within the decision of the court. As to this the following is the only attempted finding of fact: "That for more than ten years last past the said plaintiff has treated the defendant with extreme cruelty and in a cruel manner, and has often applied to her opprobrious epithets and has made false accusations against the morality and virtue of said defendant; and the said plaintiff for more than five years last past has by a uniform course of conduct been cruel to defendant, and has inflicted upon her through his harsh and ungentlemanly conduct toward her great mental suffering and cruelty." It is to be observed that not a single specific fact alleged in the cross-complaint is found to be true. The finding is most general in its character, and might with equal propriety be based upon evidence of facts entirely different from those alleged. We may suspect and surmise that the court intended to find that the cruel conduct of plaintiff was "as alleged in the cross-complaint," but it is not so declared. Again, the said finding is almost entirely a conclusion of law, and is objectionable in that respect. It is obviously not sufficient to find that "the plaintiff treated the defendant with extreme cruelty," as that is a legal conclusion for the court to reach from certain facts. But another vice is the failure to find that any act of brutality inflicted upon defendant

"grievous bodily injury or grievous mental suffering." Waiving any distinction between "grievous" and "great" mental suffering, we observe that "it was through his harsh and ungentlemanly conduct" that he inflicted upon her "great mental suffering and cruelty." There is no intimation as to what facts constituted this "harsh and ungentlemanly conduct," and it is manifest that the expression is too vague and speculative for a suitable finding.

It is stated by the supreme court, in *Franklin v. Franklin*, 140 Cal. 609, [74 Pac. 155], that "We recognize that it is the province of the trial court to find the fact as to whether or not grievous bodily injury or grievous mental suffering results from the acts of the defendant in a case such as this. (*Barnes v. Barnes*, 95 Cal. 171, [16 L. R. A. 660, 30 Pac. 298]; *Fleming v. Fleming*, 95 Cal. 430, [29 Am. St. Rep. 124, 30 Pac. 566]; *Andrews v. Andrews*, 120 Cal. 184, [52 Pac. 298]; *Curl v. Curl*, 130 Cal. 638, [63 Pac. 65].)" In brief, to satisfy the requirement of the law, there should be found at least some of the acts of cruelty embraced within the evidence, and that these acts wrongfully inflicted upon defendant grievous bodily injury or grievous mental suffering, or both. It is apparent, as already seen, that the findings here fall far short of this requirement.

It may be added that there is a mistake in the decree in the description of the real property which is set apart to defendant. Of course, this will be corrected in the event of a new trial and a similar decree in behalf of defendant.

The judgment is reversed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 1019. First Appellate District.—April 2, 1912.]

**EMMA STIERLEN, Appellant, v. GEORGE STIERLEN
and ROSA SCOTT (Otherwise Known as Mrs. GEORGE
STIERLEN), Respondents.**

DIVORCE IN ANOTHER STATE — VACATING DECREE FOR FRAUD — JURISDICTION NOT LIMITED TO CODE PROVISION FOR OTHER RELIEF—MOTION WITHIN REASONABLE TIME.—Where a divorce between a husband and wife was obtained in another state, an order obtained by the wife, upon notice to the husband, vacating the decree on the ground of fraud practiced both upon the court and upon the wife by the husband in its procurement, is not governed by a code provision of such state limiting the time for relief from a judgment for mistake, inadvertence, surprise or excusable neglect, but is governed by what the court may deem a reasonable time for relief on the ground of fraud.

Id.—RULE IN THIS STATE AS TO VOID JUDGMENT.—In this state a void judgment is not governed by section 473 of the Code of Civil Procedure.

Id.—COMMENT BY SUPREME COURT.—The supreme court in denying a rehearing expresses its opinion that the foregoing statement is not necessary to the decision, and that in so far as it may be construed as applying to any judgment not void on its face, viz., on an inspection of the judgment-roll, its correctness is doubted, and approval is withheld therefrom.

Id.—INHERENT POWER OF COURTS OF GENERAL JURISDICTION TO RELIEVE FROM JUDGMENTS FOR FRAUD—QUESTION OF REASONABLE TIME—DISCRETION.—The power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction, and the same may be exercised after the lapse of the statutory time for relief on other grounds, provided such motion is made within a reasonable time. What is a reasonable time for such relief on the ground of fraud is a matter of sound legal discretion in the court in which the motion is made.

Id.—DETERMINATION AGAINST LACHES OF WIFE IN MOVING TO SET ASIDE DECREE—CONCLUSIVENESS IN THIS STATE—SECOND MARRIAGE OF HUSBAND.—Where the court of the state in which the decree of divorce was rendered, in setting aside the decree, held that the wife was not guilty of laches in making her application to set aside the decree on the ground of fraud of the husband in procuring the decree, that interpretation of the law of that state is conclusive upon the courts of this state, in which the validity of a second marriage by the husband is involved.

ID.—ACTION BY FORMER WIFE TO ANNUL SECOND MARRIAGE OF HUSBAND —ABSENCE OF LIMITATION DURING JOINT LIVES.—Where the husband, after obtaining the fraudulent decree of divorce against his former wife, remarried in this state, after the annulment of such fraudulent decree such remarriage may be annulled at the suit of the former wife, without any other limitation than that, under section 53 of the Civil Code, such suit may be brought at any time during their joint lives; and the fact that it was not begun until nearly seven years after the entry of the decree of divorce is not imputable as laches.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Frank J. Hennessy, for Appellant.

F. V. Meyers, for Respondents.

KERRIGAN, J.—This is an appeal by plaintiff from a judgment in favor of defendants, and from an order refusing a new trial, in an action to annul the marriage of the defendants.

In February, 1886, the plaintiff and the defendant George Stierlen were married in San Francisco. There they continuously resided from that time until the month of March, 1896, when George Stierlen left plaintiff, and after visiting several places, arrived in the state of North Dakota in the following month, where he remained until the following November, when he returned to California and permanently resumed his residence here—having been absent from the state for not more than seven months. While in North Dakota, and in the month of July, he filed in that state a complaint in divorce against the plaintiff herein. Within the time allowed by law she filed an answer, which she subsequently withdrew; and the court, after hearing the evidence introduced on behalf of George Stierlen, on the seventeenth day of November, 1896, dissolved the marriage. Upon the entry of the decree George Stierlen left the state of North Dakota and returned to California, as above mentioned, where on the twenty-seventh day of November, a few days after his arrival here, he married the defendant Rosa Scott. Shortly thereafter he again visited North Dakota, remaining there about six weeks.

On the twenty-fifth day of September, 1897, Emma Stierlen filed in the North Dakota court a petition to set aside said decree of divorce, whereupon an order to show cause was issued, directing George Stierlen to show cause on October 23, 1897, why the decree of divorce should not be vacated and set aside. The hearing of this motion was continued by consent from time to time until March 14, 1898, when evidence was introduced in support of the motion, which tended to show that George Stierlen was not a *bona fide* resident of North Dakota, that the decree was obtained on perjured testimony, that Emma Stierlen had a good defense to the action—although her attorney (who was in the employ of her husband) advised her otherwise; that an agreement entered into between herself and her husband settling their property rights—by the terms of which she agreed not to resist the proceeding for a divorce—was the result of false representations as to the merits of her defense and as to her rights, made to her by her attorney and other agents of her husband. Said petition, which was verified, embraced many additional averments of deceit, concealment and fraud.

It may also be mentioned here that at this hearing the court's attention was for the first time called to the fact that George Stierlen in his complaint alleged that he had theretofore, with intent to give his wife a ground for divorce, committed an act of adultery.

On March 14, 1898, the said motion was granted, and the decree of divorce annulled. From this order George Stierlen appealed to the supreme court of North Dakota, which court, on April 18, 1899, dismissed the appeal.

Subsequently, on August 19, 1899, the attorneys for George and Emma Stierlen joined in a stipulation dismissing the action.

Over three years thereafter, to wit, in January, 1903, Emma Stierlen, represented by a different attorney, brought the present action to have declared null and void the marriage between George Stierlen and Rosa Scott.

Other facts pertinent to the appeal will be mentioned in the course of the opinion.

In support of the judgment in the case at bar, and the order denying plaintiff's motion for a new trial, the respondents urge that the order of the court of North Dakota vacating the

decree of divorce theretofore rendered by it was and is void, because not made within one year after the moving party in the proceeding to set aside said decree had received notice of the making thereof, and that, therefore, Stierlen's marriage to the plaintiff having been dissolved, there was no impediment to his subsequent marriage to his codefendant, Rosa Scott.

The question to be determined by this court, then, is the validity of the said order vacating said decree of divorce.

Section 6884 of the Code of Civil Procedure of the state of North Dakota was introduced in evidence at the trial of this cause, and the part thereof material to this inquiry reads as follows: "The court . . . may also in its discretion, and upon such terms as may be just, at any time within one year *after notice thereof*, relieve a party from a judgment . . . taken against him through his mistake, inadvertence, surprise, or excusable neglect. . . ."

As we have seen, the divorce was granted on November 17, 1896; the petition to set it aside was filed September 25, 1897, and it was set for hearing October 23, 1897, but owing to continuances by consent of the parties it was not heard until March 14, 1898, at which time the judgment was set aside. It is the respondents' contention that the motion not having been submitted for decision within one year after the receipt by plaintiff of notice of the decree, the court lost jurisdiction to make its order setting aside the judgment; citing *Sargent v. Kindred*, 5 N. D. 472, [67 N. W. 826]; *Garr Scott & Co. v. Collin*, 15 N. D. 622, [110 N. W. 81]. Other cases to the same effect are *Knox v. Clifford*, 41 Wis. 458; *Nicklin v. Robertson*, 28 Or. 278, [52 Am. St. Rep. 790, 42 Pac. 993].

It is doubtless true, as stated by respondents, that where an order, made by a foreign court or by a court of a sister state, setting aside a judgment, is void for want of jurisdiction, it is subject to attack either in a direct or a collateral proceeding. (Black on Judgments, secs. 275, 278, 289, 818.)

But whether or not the motion to vacate the judgment came within the terms of section 6884, Code of Civil Procedure of North Dakota, is unimportant here, for the reason that it was not claimed that the judgment of the North Dakota court was taken against Emma Stierlen by reason of any of the matters enumerated in that section. The attack upon the

judgment was based upon an alleged fraud committed both upon the court rendering it and upon the defendant in the action. Hence that section is not controlling. (Black on Judgments, sec. 297 et seq.)

In this state a void judgment is not governed by section 473, Code of Civil Procedure—our corresponding section to the North Dakota section above cited. (*George Frank Co. v. Leopold & Ferron Co.*, 13 Cal. App. 59, [108 Pac. 878].)

The rule is the same in North Dakota. (*Freeman v. Wood*, 11 N. D. 1, [88 N. W. 721]; *Kitzman v. Minnesota etc. Mfg. Co.*, 10 N. D. 26, [84 N. W. 585]; *Martinson v. Marzolf*, 14 N. D. 301, [103 N. W. 937].) There, as in many other states of the Union, the rule is that the power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction, and that the same may be exercised after the lapse of the statutory time which limits the entertainment of applications based upon surprise, inadvertence and so forth, provided that such motions are made within a reasonable time. What is a reasonable time is a matter of sound legal discretion in the court in which the motion is made.

In the present case the North Dakota court held that Emma Stierlen was not guilty of laches in making her application. That interpretation of their law is conclusive upon the courts of this state. (*McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, [84 Am. St. Rep. 20, 64 Pac. 103]; 1 Black on Judgments, secs. 329, 842, 859, 861; Black on Interpretation of Laws, p. 623.)

The question of the plaintiff's laches in not bringing the present action until nearly seven years after the rendition or entry of the decree of divorce was decided against the defendants on the former appeal, when it was held that, under the terms of section 83 of the Civil Code, a suit for annulment of a marriage on the ground that the defendant had a former husband or wife living might be brought at any time during their joint lives. (*Stierlen v. Stierlen*, 6 Cal. App. 420, [92 Pac. 329].)

The judgment and order are reversed.

Hall, J., and Lennon, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by

the supreme court on June 1, 1912, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision by the district court of appeal for the first district, it is proper to say that the following paragraph in the opinion, namely: "In this state a void judgment is not governed by section 473, Code of Civil Procedure—our corresponding section to the North Dakota section above cited (*George Frank Co. v. Leopold & Ferron Co.*, 13 Cal. App. 59, [108 Pac. 878])" is not necessary to the decision. In so far as this may be construed as applying to any judgment not void on its face—viz., on an inspection of the judgment-roll—we doubt its correctness, and withhold our approval therefrom.

The application for a hearing in this court is denied.

[Civ. No. 916. Third Appellate District.—April 2, 1912.]

A. E. CULVER, Respondent, v. J. W. NEWHART, Appellant.

MUTUAL, OPEN AND CURRENT ACCOUNT—ASSIGNABILITY—HUSBAND AND WIFE—CONDUCT OF BUSINESS—POWER OF ATTORNEY—INSUFFICIENT DEFENSE.—A mutual, open and current account, like an ordinary account, is property consisting of a chose in action, which is the subject of transfer, sale or assignment, or reassignment. A husband who, in the course of his business, has acquired such an account, may assign and transfer his business, including such account, to his wife, under a recorded instrument, and may, under her power of attorney, continue the business for her in the same manner as before such assignment, and she may thereafter reassign said account to her husband, who may sue thereon as her assignee; and it is no defense that the last items on the debit side of the account were not contracted with the wife personally, and that all transactions were between the husband and the debtor sued.

ID.—ABSENCE OF VARIANCE—PROOF CORRESPONDING TO ALLEGATIONS.—Where the complaint against the debtor sets forth all of the facts, including the assignment made by the husband to the wife, and the reassignment from the wife to the husband, and alleges that at the time of the reassignment the defendant was indebted to the wife in

a certain sum on a certain "open, current and mutual account," and that on the date of the reassignment she sold and assigned said account to the plaintiff, and the evidence shows that on that date there was due her on said account the specified balance, if it appears from the evidence that the account was of the character alleged, there is no variance.

D.—SUPPOSITION OF STATED ACCOUNT—ISSUE AS TO "MUTUAL, OPEN AND CURRENT ACCOUNT"—IMMATERIAL VARIANCE—STATUTE OF LIMITATIONS WAIVED.—Assuming that the evidence shows the account to be a stated account, and not "mutual, open and current," within the meaning of section 344 of the Code of Civil Procedure, still the variance arising by reason thereof would be immaterial under section 489 of the same code, because the defendant could not be actually misled thereby to his prejudice, since he does not deny the existence of the account, but merely joined issue as to whether the account was "mutual, open and current," and it is immaterial whether the account was stated or mutual, as the statute of limitations was not pleaded, and that defense is waived.

V.—ACCOUNT "MUTUAL, OPEN AND CURRENT"—MATTERS OF SETOFF.—The account in question is in its nature a "mutual, open and current account" within the contemplation of section 344 of the Code of Civil Procedure, since the credit side of the account besides one cash payment and several orders on others, had five items for lumber sold and delivered to the plaintiff as the original owner of the account by the defendant, thus consisting of matters of setoff *pro tanto*, which constituted the account "open, as contradistinguished from an account stated." Mutual accounts are made up of matters of setoff.

M.—EVIDENCE OF RENTAL VALUE OF PLANE—KNOWN TERMS OF PRIOR LEASE—SUPPORT OF FINDING.—A charge to the defendant of \$20 per month for the rental value of a planer, which had been before leased by plaintiff to a third party at that rental, to the knowledge of the defendant, and to which rental the defendant in practical effect succeeded, is properly considered as evidence of the reasonable rental value of the planer, and in the absence of any evidence to the contrary, it is sufficient to support a finding of such rental value of the use of the planer against the defendant.

ID.—PROPER EVIDENCE OF THIRD PARTY AS TO PRIOR RENTAL AND DELIVERY OF PLANE.—The court properly allowed the evidence of such third party to show the monthly rate of rental previously paid by him for the use of the planer for a year and a half, and that he transferred the possession thereof to the defendant.

ID.—LOST POWER OF ATTORNEY—SECONDARY EVIDENCE—GENERAL POWER—SUPPORT OF FINDING—ABSENCE OF PREJUDICIAL ERROR.—Where the power of attorney executed by the wife to the husband was shown to have been lost, and not to have been found after diligent

search, secondary evidence was admissible to show that it was a general power of attorney, authorizing him to transact all kinds of business in her name, and to collect the accounts and dispose of the property that had been assigned to her, and was sufficient to support a finding to that effect; and it is held that no error prejudicial to the defendant was committed in rulings upon questions and answers relative to such evidence.

ID.—EVIDENCE—BILL OF SALE FROM HUSBAND TO WIFE—BUSINESS "ACCOUNTS AND INDEBTEDNESS"—PAROL EXPLANATION—ACCOUNT IN QUESTION.—The bill of sale made by the plaintiff, as husband, to his wife, purporting to convey to her all of his business, personal property, and "accounts and indebtedness" due to him, was properly admitted in evidence; and the plaintiff properly testified and was entitled to show, if the bill of sale is ambiguous in that respect, that the account here in question was included in the "accounts" sold and delivered to her.

APPEAL from a judgment of the Superior Court of Siskiyou County, and from an order denying a new trial. James F. Lodge, Judge.

The facts are stated in the opinion of the court.

Taylor & Tebbe, and C. J. Luttrell, for Appellant.

L. F. Coburn, for Respondent.

HART, J.—The complaint alleges that on the first day of September, 1910, the defendant was indebted to Mrs. A. E. Culver, wife of the plaintiff, in the sum of \$687.90, "the same being a balance of an open, current and mutual account," etc., which said account is annexed to and made a part of the complaint; that on said first day of September, 1910, Mrs. Culver "sold, assigned and set over the said debt to this plaintiff."

The answer denies that the defendant was at any time indebted to Mrs. Culver in any sum or amount, and also denies the alleged assignment of the account referred to in the complaint or of any account by Mrs. Culver to the plaintiff.

The court's findings of fact were in favor of the plaintiff, and the court rendered and caused to be entered a judgment in accordance with said findings for the sum of \$492.13.

The defendant has appealed to this court from said judgment and from the order denying his application for a new trial.

The defendant challenges all the findings, and furthermore charges that a number of rulings as to the evidence were erroneous and damaging to his rights.

The first and perhaps the most important point urged is that the evidence does not support the finding that the transactions from which this action arises "constitute an open, current and mutual account between the defendant and the said Mrs. A. E. Culver from August 10, 1909, to September 2, 1910, of which the said \$432.13 was and is the balance." In other words, the claim is that there is "not only no evidence that Mrs. A. E. Culver ever had any account whatever against defendant, but also no evidence whatever of any account that defendant, Newhart, had against Mrs. Culver at any time"; that the account put in evidence, whatever its character, was one between the plaintiff and the defendant. Hence, it is argued, Mrs. Culver could not assign an account which she never owned. We understand it to be also claimed that the alleged account is not a "mutual, open and current account," within the meaning of section 344 of the Code of Civil Procedure, and that, therefore, by reason thereof a variance also arises between the pleaded account and the one proved.

The points as thus stated result from the defendant's construction of the several transactions from which the account pleaded in the complaint arose.

1. It appears that the plaintiff had been engaged in business in the town of Dunsmuir, Siskiyou county, under the name of "Nelson Lumber Company," and that on the tenth day of August, 1908, he transferred to his wife, Mrs. A. E. Culver, said business, together with all "the accounts and indebtedness" then due him, and among the accounts so transferred was the one which the evidence discloses constitutes the subject of this action. This transfer was evidenced by a written instrument or bill of sale, executed by the plaintiff, and, with the property and accounts so sold, delivered to Mrs. Culver, and recorded in the office of the county recorder of Siskiyou county, on the eleventh day of August, 1908.

The plaintiff testified and the court found that on the tenth day of August, 1908, Mrs. Culver, by a written power of attorney, clothed him with full authority to manage said business for her, and that, in pursuance of the authority so conferred, he continued, after the sale of the business to her, to give his personal attention to said business and to manage it for his wife in the same manner as he had prior to the transfer of the same.

At the time of the transfer of the business and book accounts to Mrs. Culver there was due the plaintiff from the defendant, on the account referred to in the complaint, the sum of \$1,650, made up of the following items: April 1, 1908, one donkey-engine, \$1,200; May 1, 1908, 500 feet $\frac{7}{8}$ -inch cable, \$100; May 20, 1908, 1,000 feet of $\frac{7}{8}$ cable, \$200; May 20, 1908, 4,000 feet of $\frac{1}{2}$ -inch steel cable, \$150. A short time prior to the first day of January, 1909, the above account was rendered to the defendant, and, on the said first day of January, there was added thereto the interest which had accrued thereon, amounting to the sum of \$87.50, and bringing the total indebtedness of the defendant to the plaintiff up to the sum of \$1,737.50. On said account, the defendant made one cash payment of \$100, and at various times delivered to the plaintiff lumber and orders on certain individuals, the value of said lumber and orders being credited by plaintiff on said account, the amounts so credited aggregating the sum of \$1,314.27.

The last item noted on the debit side of said account is dated May 20, 1908. There were two items on that date, the others being dated April 1, 1908, and May 1, 1908, respectively.

The last item on the credit side of said account is dated November 2, 1909, said credit, as well as several more, having been given and noted on said account by the plaintiff as agent of Mrs. Culver.

This action was commenced on the second day of September, 1910, or within two years from the date of the last item noted on the credit side of the account and more than two years after the date of the last item on the debit side. But no issue as to the statute of limitations is presented here, no plea of that character having been made by the defendant. The sole contention as to the point now under consideration

seems to involve the claim that there is a fatal variance between the account pleaded and the one proved. This contention is, as before suggested, based upon the proposition that the defendant never had any dealings of any kind or character with Mrs. Culver—that is to say, that the account was one entirely between the plaintiff himself and the defendant, and that Mrs. Culver was a stranger to and in no sense connected with the transactions culminating in the account; that, to quote counsel's language, "to have constituted an open, current, running account between Mrs. Culver and defendant, there must have been some sale from Mrs. Culver to defendant; that there is no proof of any such occurrence."

We see no merit in the proposition as thus laid down. To sustain it would be to hold that a mutual, open and current account cannot be made the subject of transfer or sale or assignment, for, obviously, if the contention of appellant be sound, an action on such an account could not be supported by an assignee or purchaser of the same, since it is very plain that, in the very nature of things, he could not show as to the account as assigned that he had personally made "some sale" to the debtor or that the items on the debit side of the account involved transactions between himself, personally, and the debtor. This is not the law, however. No one will dispute the proposition that a mutual, open and current account, like an ordinary account, is property—that is, a chose in action—and that, therefore, the plaintiff, as the original owner of the account in question, had the undoubted right to sell and transfer the same to his wife or to any other person (Civ. Code, secs. 1458, 953 and 954), subject, of course, to any equities which might have existed as to said account in favor of the debtor, and that she, having legally, so far as it appears here, acquired ownership of said account, could likewise sell and transfer it to whomsoever she pleased, or, as in this case, resell or assign it to her husband.

The complaint contains no averment that Mrs. Culver personally had anything to do with any of the several transactions from which said account arose. It merely alleges that, on the first day of September, 1910, the defendant was indebted to Mrs. A. E. Culver on a certain "open, current and mutual account," and that on that day she sold and assigned

said account to the plaintiff. The evidence discloses, as we have shown, that Mrs. Culver was the owner of the account on the day named, and that there was due her on said account a balance of several hundred dollars, and, assuming that the account was mutual, open and current between the defendant and the party from whom she purchased it, there is absolutely no variance between the account pleaded and the one proved. But, even conceding that the account is shown by the evidence to be a stated account and not "mutual, open and current," within the meaning of section 344 of the Code of Civil Procedure, still the variance arising by reason thereof would be immaterial. (Code Civ. Proc., sec. 469.) That section provides that "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." It cannot be said that the defendant was misled to his prejudice in maintaining his defense upon the merits. His answer does not deny the existence of the account, which is made a part of the complaint, but merely tenders an issue upon the question whether said account was "mutual, open and current" between himself and plaintiff's assignor. Had he so elected, he could have denied the existence of any open and current account against him, since the account relied upon by plaintiff was set out *in haec verba* as a part of the complaint, and fully and clearly notified him of each of the transactions or items constituting the basis or gist of plaintiff's action. And it is to be noted that the answer does not deny that the account pleaded is a "mutual, open and current" account between the defendant and *Mrs. Culver*. This leads to the suggestion that, since the importance of alleging and, if necessary, proving that the account was "mutual, open and current" lay in the proposition that thus plaintiff's action thereon would avoid the operation of the statute of limitations, and, since the defendant did not plead the statute and, therefore, waived his right to rely upon that defense, the question whether the account is a "mutual, open and current" or merely a stated account is immaterial, and, consequently, the questions left for determination under the issues are narrowed down to the following: 1. Was Mrs. Culver the owner of the account when the purported assignment thereof

to her husband (the plaintiff) was effected? 2. Did she assign the same to plaintiff? 3. Was there a balance due from defendant on said account?

But, if we deemed it important and necessary in the decision of this case to determine the question as to the nature of the account involved here, we would not hesitate to hold it to be a "mutual, open and current account" within the contemplation of section 344 of the Code of Civil Procedure, *supra*.

We have seen that the credit side of the account consists of credits for one cash payment, several orders on others and for lumber sold and delivered to the plaintiff, as the original owner of the account, by the defendant. The last five items on the credit side were for lumber sold and delivered at various times by the defendant to the owner of the account, and the value of this lumber was credited on the account as a setoff *pro tanto*. This constituted the account "open, as contradistinguished from an account stated." (*Norton v. Larco*, 30 Cal. 131, [89 Am. Dec. 70].) In that case, which has been approved in many subsequent cases in this state, a "mutual, open and current account" is thus defined: "Mutual accounts are made up of matters of setoff. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a setoff of mutual debts. A natural equity arises when there are mutual credits between the parties, or where there is an existing debt on one side which constitutes a credit on the other; or where there is an express or implied understanding that mutual debts shall be a satisfaction or setoff *pro tanto* between the parties. (Angell on Limitations, c. 14, sec. 7.)"

In *Penniman v. Rotch*, 3 Met. (Mass.) 216, the plaintiff proceeded in assumpsit for provisions sold and delivered. The defendant did not plead any setoff, but interposed the plea of the six years statute of limitations as a bar to the action. In resistance to the defendant's plea, the plaintiff stood on two items, both bearing date in excess of six years before the action was instituted. One of these items was a credit for cash, naming the sum, and the other was for a calf, with its value specified. One of the issues presented was whether the evidence disclosed a mutual and open account between the parties within the purview of the statute, which was substantially in the language of our section 344, Code of

Civil Procedure. The court, speaking by Chief Justice Shaw, "held that the calf was an article of merchandise delivered by the defendant to the plaintiff in the ordinary course of business, either at the agreed price, or upon an implied promise of the plaintiff to allow its value in amount, and that the evidence established that there was an open and mutual account between the parties, and that no part of the plaintiff's demand was barred by the statute of limitations." (*Norton v. Larco*, 30 Cal. 131, [89 Am. Dec. 70].)

There is absolutely no ground upon which any distinction as to the facts between the foregoing cases and the one at bar can be suggested. Whether there was or was not an express agreement between the parties here that the value of the lumber, obviously an article of merchandise, was to be credited on the account as a setoff in a ratio equal to such value, the irresistible inference from the circumstances of the transactions between the parties is, nevertheless, that there was an implied understanding that such was the arrangement between them. Indeed, no other conclusion could with any reason follow the circumstances by which the transactions leading to the existence of the account were carried on.

2. Among the items charged in the account against the defendant was one for the rent of a "planer" for one year at the monthly rental of \$20, the total sum of said item being \$240. Appellant insists that the evidence does not justify the finding in favor of the plaintiff as to said item.

It appears that a planing-mill, located at Dunsmuir, had been leased by the plaintiff to one George Miller. The latter was indebted to both the plaintiff's assignor, as successor to the business of plaintiff, and the defendant, and, on the fourteenth day of January, 1909, he proposed to both the plaintiff (acting for Mrs. Culver) and the defendant that if the latter would assume his indebtedness to Culver, and cancel his (Newhart's) claim against him (Miller), the latter would turn the planing-mill and the business over to the defendant. This proposition was acceded to by all the parties. Miller's lease of the planer called for the payment of rent at the rate of \$20 per month. There was no definite understanding between the plaintiff, as agent of Mrs. Culver, and the defendant as to the amount which the latter would pay as rent for the planer, but the plaintiff, assuming that the transaction

between himself, Miller and the defendant amounted only to a transfer of the lease, with all its rights and burdens, from Miller to the defendant, charged the latter on the account as rent for the planer the sum specified in the lease to Miller, viz., \$20 per month. As a matter of fact, so testified the plaintiff, at the time of the relinquishment of the lease by Miller, the real understanding was that the defendant would buy the planer, but, not having done so, he (the plaintiff) treated the transaction as involving merely a lease of the planer. In some particulars the testimony of the plaintiff with respect to this transaction was corroborated by Miller. The point made by counsel against the finding as to the planer is twofold: 1. That there is no evidence which shows that the defendant rented the planer from *Mrs. Culver* for one year at the monthly rental of \$20; 2. That the evidence does not show that the defendant entered into a contract for the leasing of the planer at \$20 per month with anybody or at all.

As to the first of the foregoing propositions, the reply is that, while it is true that *Mrs. Culver* did not *in person* conduct the negotiations by which the possession of the planer was transferred to Newhart, in legal contemplation she did do so, for the plaintiff, in the execution of that transaction, was acting for her as her agent, under the authority of the power of attorney referred to. This also constitutes a reply to a portion of the second proposition, but by the latter we understand it to be also the contention that there is no evidence disclosing that the sum of \$20 per month was the sum agreed upon as compensation for the possession and use of the planer. It is true, as before stated, that there is no evidence disclosing that any particular or definite amount as rental was expressly agreed upon by the parties; but it was indisputably shown that Newhart took possession of the planer on the fifteenth day of January, 1909, and that he maintained such possession for at least one year. It was further shown by uncontradicted testimony that Miller had paid for the use and occupation of the planer the monthly rental of \$20. From this testimony the court was justified in finding, in the absence of evidence revealing an express agreement as to rental, the reasonable value of the possession and use of said planer, and we know of no safer standard for the fixing of such value than the rental specified in the lease to which the defendant in practical

effect succeeded when he took possession of the planer. The defendant offered no testimony to show that the sum of \$20 per month as rental for the use of the planer was excessive or beyond its actual value for his purposes. Indeed, the defendant offered no testimony whatsoever with regard to the transaction involving the transfer of the possession of the planer to him. We think, as stated, that the finding as to the planer transaction is sufficiently supported.

3. It is further claimed that the evidence is insufficient to uphold the finding that, on the tenth day of August, 1908, Mrs. A. E. Culver "made, executed and delivered unto this plaintiff full power of attorney to transact any and all business for her," and that during all the time from the date of the execution of said power he acted as her agent and attorney in fact in all matters appertaining to the business acquired by her from him, including some of the transactions involved in this action.

The plaintiff testified that Mrs. Culver did, by writing, on the date mentioned, make him her attorney in fact, with full power to act as her attorney or agent to collect "the accounts and dispose of the property" that had been assigned to her; that he had mislaid or lost the instrument, and that he had made a thorough but futile search before the trial of all the places where he customarily kept important documents to find the writing. He testified that, while the power did not specify the transactions upon which this action is founded, it, nevertheless, gave him authority to "transact all kinds of business in her name." This testimony was, in our judgment, sufficient to justify the finding as to the power of attorney. The defendant did not attempt to contradict this testimony in any manner. Indeed, we may add that the defendant offered no testimony whatsoever upon any of the issues presented. He did not, by evidence, controvert the account or attempt to overcome the force of plaintiff's testimony relative to any of the transactions giving rise to the pleaded account.

4. The ruling of the court allowing the plaintiff to state the contents of the power of attorney mentioned is assigned as prejudicial error. The specific objections to the inquiry concerning said instrument were that the questions to the witness were leading and suggestive, and that his answers thereto involved his conclusions. The exceptions to the testi-

mony upon this point appear to possess no merit. The witness was permitted, without objection, to say that his wife had executed and delivered to him a power of attorney, that he had lost it, and that he searched for and could not find it. When the witness was requested to state the contents of the instrument, one of the attorneys for the defendant interrupted by inquiring whether the power had been recorded, to which question a negative answer was given. Thereafter, on redirect, over objection by the defendant, the plaintiff was allowed to say, as before noted, that he was by said instrument clothed with full authority to transact "all kinds of business in her name." As to the first question addressed to the witness with regard to the execution of the power of attorney, it may be conceded that it was leading and suggestive in form, but, there having been no objection to the question on that or any other ground, the defendant cannot, of course, claim any advantage here from the question so propounded and the answer thereto. As to the objection that the answers to the questions calling for the contents of the instrument involved mere conclusions of the witness, it is to be said that we cannot see how the instrument itself could have furnished superior evidence in that respect. It is commonly known that instruments conferring general authority on a person to act as the agent of another usually set forth the terms and scope of such authority in general language or in language which may, in a sense, be regarded as involving the statement of a conclusion as to the proposition to which it relates. The witness declared that the power vested him with authority "to transact all kinds of business in her name," and, as stated, it is highly probable that, since he was thus clothed with general authority in that regard, the instrument itself would have disclosed such authority to have been prescribed in language no less general than that in which the witness declared his authority to have been thus defined.

5. It is argued that the bill of sale from plaintiff to Mrs. Culver was erroneously admitted in evidence. We can perceive no possible objection to said instrument as evidence of the sale of the business of plaintiff and the account in controversy to Mrs. Culver. The bill of sale, as stated, is the written evidence of the sale by the plaintiff to Mrs. Culver of all his personal property, etc., and "accounts and indebt-

edness due said party of the first part." The plaintiff testified, and was thus entitled to show, if the bill of sale was ambiguous in that respect, that the account concerned here was included in the "accounts" he sold and delivered to Mrs. Culver.

6. The objection that the court erred in allowing the witness, Miller, to testify as to the transaction involving the transfer of the possession of the planer from him to the defendant and as to the rental paid by the witness for the use of the planer for a year and a half, is untenable. Manifestly, the plaintiff had the right to show that the defendant took possession of the planer, and, as evidence of the rental value thereof, to prove what the witness had paid Mrs. Culver for the use of the same for the period during which he had possession of it.

We have now reviewed all the points submitted on this appeal by the appellant. As must be apparent from the foregoing views, our opinion is that the appeal is altogether without merit.

The judgment and order are, accordingly, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1127. Second Appellate District.—April 2, 1912.]

S. M. BERNARD COMPANY, a Corporation, THOMAS HIGGINS et al., Appellants, v. THE CITY OF LOS ANGELES, a Municipal Corporation, et al., Respondents.

WIDENING OF STREET — VALIDITY OF ASSESSMENT — POSTING NOTICES — CONFLICTING EVIDENCE — DETERMINATION BY TRIAL COURT CONCLUSIVE.—In an action to annul an assessment for the widening of a street under the street opening act of 1903, in which the evidence was conflicting as to whether or not the required notices of the passage of the ordinance of intention to widen the street had been conspicuously posted upon all of the streets included within the assessment district, as required by section 3 of that act, it was for the trial court to determine the weight to be given to the evidence on

that question, and its determination against the plaintiff and in favor of the defendants must be deemed conclusive upon appeal.

Id.—RECORD OF ASSESSMENTS AND DIAGRAMS—SLIGHT UNCERTAINTY IN ONE PARCEL NOT INVOLVED—ENTIRE ASSESSMENT NOT VITIATED.—A slight uncertainty in the record of one parcel of property included within the assessment district, of which the owner does not complain, and whose assessment may have been paid, cannot vitiate the entire assessment of property in the district, nor affect the validity of the record of the assessment of the property of the plaintiff, who is in no position to complain of an alleged erroneous record of an assessment in which he is not interested.

Id.—MODE OF RECORD OF DIAGRAM — PASTING UPON STUBS IN RECORD BOOK OF ASSESSMENT—PURPOSE TO CREATE LIEN—DETACHMENT AND REPASTING IMMATERIAL.—Where the act prescribes no mode in which the diagram shall be recorded, and the purpose of the record is not to give notice of the lien created, but merely to cause it immediately to attach upon the property, the pasting of the diagram upon a stub in the record book in which the original assessment is recorded is a substantial compliance with the provision of section 20 of the act requiring the assessment and diagram to be recorded. The fact that, by handling, such diagram may be detached from the stub, and another pasting is made thereon before trial is not important, as respects the lien created.

Id.—MEANING OF WORD "RECORDED"—ABSENCE OF STATUTORY DIRECTION —NATURE OF PURPOSE AS PERMANENT OR TEMPORARY.—Though the word "recorded," in ordinary usage, signifies to copy or transcribe into some permanent book, yet such meaning of the word, in the absence of statutory direction, should attach only in those cases where the record is intended to perform functions through a long period of time. There is a manifest difference between a record intended to perform functions for a long period and one intended only to serve a temporary purpose of brief duration, which, after it is accomplished, ceases to be useful.

Id.—PURPOSE OF "RECORD" OF DIAGRAM — SUBSTANTIAL COMPLIANCE—LIBERAL CONSTRUCTION OF STATUTE.—Since there has been a substantial compliance with the purpose of the statute in requiring a record of the diagram and with the requirement whereby every right intended to be protected thereby has been secured, and since the statute expressly declares that this act shall be liberally construed to promote the objects thereof, it is held that appellants' contention to the contrary cannot be sustained.

Id.—ACQUIREMENT OF JURISDICTION TO CONDEMN LANDS FOR WIDENING STREET—REQUISITE NOTICE—ADJOURNMENT OF HEARING.—Where all of the proceedings requisite for the acquirement of jurisdiction to condemn lands for the widening of the street, upon the report of the referees, were taken with the notice which was required by spe-

tion 11 of the act of 1903, as originally enacted, and also with the further notice required by that section as amended in 1909 after the enactment of the amendment, the court, after being thus vested with full jurisdiction, had the right to adjourn the time appointed to hear the report of the referees, without further notice than that required by section 11 as it existed when jurisdiction was acquired.

ID.—POWER OF CITY COUNCIL TO ABANDON PROCEEDINGS—LOSS OF POWER UNDER AMENDED ACT.—Where no power of the city council to abandon proceedings under the original section 14 of the act of 1903, at any time prior to the payment of compensation was exercised thereunder, and under the amendment of 1909 to that section its jurisdiction to abandon the proceedings was expressly limited to a time preceding the entry of the interlocutory judgment, its attempt to abandon the proceedings after such entry is held void and of no effect, under the authority of *Title Insurance & Trust Co. v. Lusk*, 15 Cal. App. 358, [115 Pac. 58], for want of power to abandon the same.

ID.—IMPLIED ACTION UPON PROTEST—ORDER FOR NEW ASSESSMENT.—The ineffectual attempt of the council to abandon the proceedings was effective to the implied extent of sustaining the protests. The city council had jurisdiction to hear the protests and act upon them, and either affirm, modify or correct the assessment, or to order a new assessment, as it subsequently did in the proper exercise of its power, which it had no jurisdiction to abandon or nullify after the entry of the interlocutory decree.

ID.—MOOT QUESTION—REVIEW UPON APPEAL FROM ORDER—DISMISSAL.—This court will not review an appeal from an order which involves a mere moot question, in view of its conclusions upon the merits of the case, but the appeal from such order will be dismissed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. F. E. Densmore, Judge Presiding.

The facts are stated in the opinion of the court.

Trippet, Chapman & Biby, and Lewis Cruickshank, for Appellants.

John W. Shenk, City Attorney, and Myron Westover, Deputy City Attorney, for Respondents.

SHAW, J.—Action to have declared null and void a certain assessment levied against the property of plaintiffs to pay the cost of widening Eighth street from Main street to Central

avenue, in Los Angeles, and to restrain the threatened sale of such property on account of delinquency in the payment of such assessment.

Judgment went for defendants, from which, and an order denying their motion for a new trial, plaintiffs appeal.

On March 8, 1907, the city council, pursuant to the provisions of the street opening act of 1903 (Stats. 1903, p. 376), duly adopted an ordinance declaring its intention to widen Eighth street between the points named by adding thereto a strip of land twenty feet in width on the southerly line thereof, from Main street to San Pedro street, and a strip of like width on the northerly line from San Pedro street to Central avenue, held in private ownership, and at the same time fixed the exterior boundaries of an assessment district, the property included within which was declared to be benefited by the contemplated improvement and which it was proposed to assess for the expense thereof. Pursuant to ordinance authorizing the same, an action was instituted to condemn the strip of land required for the proposed improvement, and on or about December 22, 1909, an interlocutory judgment was entered therein, fixing the awards of damage to those whose property was required for use in widening the street. Thereafter the cost and expense of the improvement was duly assessed upon all of the lots and lands within the assessment district, which assessment was duly filed with the city clerk on July 29, 1910, and notice of such filing given by the clerk as required by section 18 of the street opening act. Within the time allowed therefor, protests and objections against the assessment were filed by a number of persons owning property within the district. These protests were regularly set for hearing on September 13, 1910, and continued from time to time until November 15, 1910, on which date the city council adopted an ordinance directing the abandonment of the proceedings upon condition that the property owners interested in such action should pay to the city treasurer a sum of money required to reimburse the city for expenditures theretofore made in the performance of the work. The property owners complied with this condition, and on December 27, 1910, the city adopted an ordinance whereby it declared the proceedings for widening the street abandoned. Thereafter, on January 3, 1911, parties in interest applied

to this court for a peremptory writ of mandate to be directed to the city council commanding it, notwithstanding the adoption of the ordinance declaring the proceedings abandoned, to proceed in said matter as required by section 19 of the act and confirm, modify or correct the assessment filed July 29, 1910, or order a new assessment to be made. The writ was issued as prayed for, and in compliance with such mandate the city council ordered a new assessment, which was made, and on April 6, 1911, filed with the city clerk, who gave the notice required by law of the filing of the same. Protests filed, objecting to this new assessment, were denied and the assessment confirmed on May 23, 1911.

Appellants concede the proceedings in all respects regular and legal, except as to the irregularities specifically pointed out in their briefs. These specifications are as follows: First. The alleged failure to post notices of the passage of the ordinance of intention, as required by section 3 of the act. Second. Uncertainty in describing one lot or parcel of land, designated on the diagram and in the assessment as No. 160. Third. The alleged failure to record the diagram and assessment as required by section 20 of the act. Fourth. Failure to publish notice of the time fixed for hearing the report of the referees appointed in the condemnation suit pursuant to section 8 of the act, as required by section 11 thereof as amended in 1909. Fifth. It is claimed the adoption by the city council of the ordinance abandoning the proceedings terminated the same and rendered the subsequent assessment null and void. Sixth. Conceding the action of the city council in abandoning the proceedings was without warrant and in contravention of statutory provision, it is nevertheless claimed that no action was had upon protests to the first assessment, and the making of the new assessment was unwarranted and is illegal for the reason that it was not made at the next regular meeting of the city council after the expiration of the time for filing objections, nor at any time to which the hearing of such objections was adjourned, and by reason thereof the city lost jurisdiction to act in the matter.

1. As to the issue joined upon the alleged failure to post notices of the passage of the ordinance of intention in accordance with section 3, the court found in favor of defendants. Upon this question of fact the affidavit made March 18, 1907,

by one Blanchard showed that on said date he properly posted the notices along Eighth street between the points named, but there were a number of cross-streets as to the posting of which the affidavit was silent. Thereafter, on January 19, 1911, another affidavit, amendatory of the first and showing the posting on March 18, 1907, of notices upon all streets within the assessment district, as required by section 3, was made by Blanchard. In addition to the *prima facie* case made by these affidavits was the testimony of Blanchard, which clearly tended to prove that notices were properly posted, on the date named in the affidavits, upon all streets within the assessment district. There was also testimony of other witnesses to the effect that they saw notices upon some, at least, of these side streets. As against this showing was the testimony of several witnesses on behalf of plaintiffs wherein it was stated they had opportunity to observe, and did not see notices posted upon certain of the cross-streets. At most, there was a conflict of evidence upon which the determination of the trial court must be deemed conclusive. While it may be true, as contended by appellants, that Blanchard's testimony, in so far as it is inconsistent with the first affidavit, should be accorded little weight, nevertheless, conceding the omission to mention the cross-streets not in harmony with the amended affidavit and testimony of Blanchard, it was for the trial court to determine the weight to be given the evidence. The case bears no analogy to that of *Pierce v. City of Los Angeles*, 15 Cal. App. 702, [115 Pac. 746], cited by appellants.

2. Section 17 of the act provides that each lot or parcel of land shall be described in the assessment and designated by an appropriate number which shall correspond with a like number designating upon the diagram the lot or parcel of land so described in the assessment. Assessment No. 160 described a parcel of land as "North 86 feet of lot 4 and lot 5 except west 80 feet." As recorded, this assessment was made to read: "North 86 feet of lot 4 and 5 except the west 80 feet." By reason of this fact appellants insist the entire assessment is void. Clearly, the property was described as required by section 17. The error, if it be such, was due to the omission of the word "lot" preceding the figure "5" in recording the assessment and diagram as required by section

20 of the act, which provides that, "from the date of such recording all persons shall be deemed to have notice of the contents of such assessment-roll. Immediately upon such recording the several assessments contained in such assessment-roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made." Under this provision, when recorded, each one of the several assessments contained in the assessment-roll constitutes a lien upon the particular piece of property against which it is made. The purpose of the recording is to impart notice, by an inspection of the record, to the owners of the lots assessed, as well as to others interested in transactions concerning the property. Where the record shows such uncertainty in describing a lot that an inspection thereof fails to impart notice of the existence of the lien, it is fatal to such claim. (*Labs v. Cooper*, 107 Cal. 656, [40 Pac. 1042]; *Blanchard v. Ladd*, 135 Cal. 214, [67 Pac. 131].) The alleged error in recording was confined to one piece of property, the assessment of which was No. 160. It does not appear that anyone interested therein is contesting the validity of the alleged lien; indeed, from all that appears to the contrary, the assessment has been paid. Under these circumstances, since the property of appellants assessed for their proportionate part of the cost of the improvement is not affected by the alleged erroneous record of assessment numbered 160, they are not in a position to complain. We find no authority in the act, or elsewhere, which would warrant us in holding the entire assessment void upon the ground stated. The case is unlike those wherein the entire assessment is held void on account of omitting from the diagram marks or data indicating the points of the compass, or where for other reasons it is impossible to determine the land it is sought to subject to the lien.

3. It is insisted that the evidence shows a failure to record the diagram in accordance with the provisions of section 20 of the act, as found by the court, and without which the assessment would not constitute a lien upon the property. It appears that a book was prepared and kept in the office of the board of public works wherein the original assessment as made was copied; that following a number of pages, estimated to be sufficient for copying the assessment, were inserted

and bound in this book stubs of leaves one and one-half to two inches in width, to which the original diagram was attached by pasting the same to these stubs; that through constant use and handling the diagram became loosened and partially detached from the stubs, and within a few days from the time it was so attached it was wholly separated therefrom, and for more convenient use was kept by the clerk of the board in a drawer until a few weeks before the trial, when it was again attached to the stubs in this book of record. The contention of appellants is that, since the statute does not prescribe the manner in which the diagram shall be recorded, it must be transcribed by copying in the book kept for such purpose the lines, figures and other data appearing upon the original. On the other hand, respondents insist that attaching the original diagram to the stubs in the record book, thus making it a part thereof, was a sufficient recording thereof within the meaning of the statute. The question involved is not one of constructive notice to plaintiffs, but whether or not the lien was perfected by making the record. Hence, if the pasting of the document in the book kept for that purpose constituted a recording thereof, the fact that in a few days it became separated therefrom and was detached from its holdings, is unimportant, for the statute provides that *immediately* upon such recording the lien attaches. Under the provisions of section 20, when the assessment and diagram are recorded, with the certificate of the date of the recording, such record, not the original, constitutes the assessment-roll. The street improvement act of 1885, [Stats. 1885, p. 147], commonly known as the Vrooman act, provides that the warrant, assessment and diagram, after the recording thereof, shall be delivered to the contractor doing the work. Here, however, there was no contractor, and, so far as we are able to perceive, the original assessment and diagram, since the record thereof constitutes the assessment-roll, performed no function whatever after the recording of the same. The statute is silent as to any provision prescribing the manner in which the diagram shall be recorded. From the nature of the case, it is intended to answer a purpose speedily accomplished. Every purpose of recording is fully subserved by binding or otherwise fastening the original documents in a book kept for the purpose. In our opinion, while the practice is not to be

commended, the use of the original in the manner stated constituted a substantial compliance with the provisions of section 20 requiring the assessment and diagram to be recorded. While it may be true, as claimed by appellants, that the word "recorded," in ordinary usage, signifies to copy or transcribe into some permanent book (*Cady v. Purser*, 131 Cal. 552, [82 Am. St. Rep. 391, 63 Pac. 844]), such meaning of the word, in the absence of statutory direction, should attach only in those cases where the record is intended to perform functions throughout a long period of time, such as that of a deed or judgment. In such case reason exists for requiring the record to be made in durable form. In *Hager v. Melton*, 66 W. Va. 62, [66 S. E. 13], the court, in holding the pasting of the original ordinance for street improvement in the minute-book to be a sufficient recording thereof, said: "Whether actual transcription is necessary to effect a recordation depends, in our judgment, upon the character of the record. There is a manifest difference between a record intended to subserve purposes or perform functions throughout a long period of time, such as that of a deed, judgment, decree, or statute, and one intended only to subserve a mere temporary purpose. In the former case, there is a reason for requiring the record to be made in durable form, and, hence, there may be a presumption of legislative intent to require it. . . . Here the object is to put in force an ordinance for an improvement intended to be made and the cost thereof collected in a short period of time. After that has been accomplished, it performs no useful purpose. . . . We think the pasting of the ordinance and affidavit in the journal is a substantial and sufficient compliance with the requirements of the charter." In order to sustain appellants' contention, when it thus clearly appears there has been a substantial compliance with the requirement whereby every right intended to be protected is secured, we must ignore the express declaration of the legislature that "this act shall be liberally construed to promote the objects thereof."

4. The referees in the condemnation suit, appointed by the court to ascertain the value of the property required for use in widening the street, filed their report in the action on April 7, 1909. The court appointed May 8, 1909, as the time for hearing the same, notice of which was duly given as

required by section 11 of the act as it then existed. On said date, the court having acquired jurisdiction of all parties entitled to be heard, continued the hearing to May 24th, followed by orders duly and regularly made continuing the hearing from time to time until June 30, 1909, upon which date the hearing was commenced and proceeded to a conclusion. Under section 11 of the act, as it existed on April 7, 1909, when the report of the referees was filed, no notice of any kind was required to be given of the time fixed for the hearing of the report, other than to persons who had answered in the action. Those who had made default were not entitled to notice of any kind. This provision remained in force down to June 20, 1909, on which date section 11, as amended by act of the legislature approved April 21, 1909, [Stats. 1909, p. 1035], took effect. As amended, the section, in addition to the notice prescribed by the original section, provided for notice by publication of the time and place set for hearing the report, the publication of which notice should commence at least ten days before the time appointed for hearing the report. The amendatory act provided that all proceedings pending at the time the amendment took effect should, from the stage of any such proceedings or action then commenced and in progress at the time the act took effect, be conducted under the provisions of the act as amended. All notices of the time and place of the hearing of the report required to be given by the provisions of section 11 were duly given prior to May 8, 1909, the date fixed for the hearing, on which date the court was fully vested with jurisdiction to hear the report. The acquisition of such jurisdiction, the proceedings to obtain which were complete on May 8, 1909, marked the close of that stage thereof wherein the acts required to confer such jurisdiction were done and performed. Jurisdiction having vested, the court had the right to continue the time for hearing the report, which was the next stage in the proceedings, without further notice than that required by section 11 as it existed at the time jurisdiction was acquired.

5. It is next urged that the effect of adopting the ordinance on December 27, 1909, declaring the proceedings abandoned, was to nullify and vacate all proceedings theretofore had and taken. The ordinance of intention was adopted on March 8,

1907. Under the law as it then existed (section 14 of the act), the city was authorized to abandon the proceedings and cause a dismissal thereof at any time prior to the payment of the compensation awarded in the condemnation suit to property owners. By act of the legislature, approved April 21, 1909, said section 14 was amended so as to read as follows: "The city council may at any time prior to the entry of interlocutory judgment, abandon the proceedings by ordinance and cause such action to be dismissed without prejudice." This amendatory act took effect on June 20, 1909. It was provided therein that proceedings pending at the time when it took effect should, from such stage thereof, be conducted under the provisions of the amended act. The interlocutory decree was not entered until December 22, 1909, some six months after the amendment took effect, and during all of which time the city council might have dismissed the action, prior to the entry of such decree, and abandoned the proceedings. It did not avail itself of such right, but continued to prosecute the proceedings until long after the entry of the interlocutory decree was made, when, on December 27, 1910, and after the making and filing of the first assessment, it attempted to abandon the proceedings and dismiss the action, contrary to the provisions of section 14 as amended. The case of *Title Insurance & Trust Co. v. Lusk*, 15 Cal. App. 358, [115 Pac. 53], is authority for holding that the ordinance providing for the abandonment of the proceedings was void and of no effect, for the reason that the council was at the time without power to abandon the same. It is unnecessary to restate the reasons for so holding set forth in that opinion; suffice it to state that we adhere to what was there said in discussing the point involved.

6. It is claimed that no action was ever had by the city council upon the protests interposed to the first assessment, and that the city council had no power to order the new assessment. This contention is based upon the provisions of section 19 of the act, which, in substance, provides that all objections to the assessment shall be filed with the city clerk within the time prescribed in the notice required to be given by section 18, and that at the next regular meeting of the city council after the expiration of the time for filing objections, the clerk shall lay the assessment, and all objections thereto,

before the city council, and at said meeting, or at any time to which the hearing may be adjourned, it shall hear such objections and pass upon the assessment, and confirm, modify or correct the same, or it may order a new assessment. It appears from the record that after the original assessment was filed with the city clerk, he gave the notice thereof as required, and that within due time various protests were filed by property owners objecting to the assessment; that a time was duly appointed for hearing the same, and from time to time, to which the hearing was adjourned, such objections were heard and considered, the decision thereon being likewise from time to time postponed. On November 15, 1910, the ordinance directing the abandonment, subject to the property owners reimbursing the city for expenditures theretofore made in the matter, was adopted, and such payment being made, the ordinance of December 27, 1910, declaring the proceedings abandoned, was passed. We find nothing in the record which shows that the city council in terms acted upon and by order formally made sustained the protests, as found by the court. If such order was necessary, the action of the city council in abandoning the proceedings must be deemed a sufficient compliance with that requirement. The result of the abandonment, effective to such extent, was to sustain the protests. However, there is nothing in the act which requires the city council in terms to pass upon the objections. The section provides that, after hearing the same, it "shall pass upon such assessment and may confirm, modify, or correct said assessment, or may order a new assessment." The city council had jurisdiction to hear the protests; it did accord a full hearing and did, as it was authorized to do, order a new assessment. It is insisted, however, that by reason of the failure of the city council to continue the hearing of the protests, it lost jurisdiction to order a new assessment. It is true, we think, that where the council fails to hear or act upon protests interposed to an assessment, at its regular meeting after the expiration of the notice required by section 18, and neglects to make an order postponing such hearing, it loses jurisdiction to act upon the assessment, except upon a republication of the notice. (*Stoner v. City Council of Los Angeles*, 8 Cal. App. 607, [97 Pac. 692].) The property owners filing objections must be heard at such regular meeting, or at some

other time to which the hearing is *at such regular meeting* adjourned. The law provides no other means of imparting notice of a postponement of the hearing other than knowledge of the action of the city council then had and taken. While the power of the council in hearing objections is thus limited, we do not consider the section as imposing like limitations upon it as to the time when it may render its decision upon the objections. Having accorded the protestants a full hearing, it may, in the absence of an order continuing the hearing, render its decision thereon at any time, and confirm, modify, or order a new assessment. Moreover, if, as claimed by appellants, the city council had lost jurisdiction to act at all upon the original assessment, by reason whereof it was *functus officio*, and since it could not abandon the proceedings, it was clearly within its power to order a new assessment, "upon which order like proceedings (are) had as in the case of an original assessment." To sustain appellants' contention would permit the city council, by neglecting to perform an act enjoined upon it by law, to thus indirectly nullify the provisions of section 14 which prohibit it from abandoning the proceedings after the entry of the interlocutory decree.

7. The record includes an appeal from an order of court denying plaintiffs' application for an injunction *pendente lite*, and dissolving a restraining order theretofore made. Under the conclusion reached upon the merits of the case, no purpose could be subserved by passing upon this alleged error. The sustaining of the judgment by this court renders the alleged error a moot question. The appeal from this order is, therefore, dismissed.

It follows that the judgment and order denying plaintiffs' motion for a new trial should be affirmed, and it is so ordered.

Allen, P. J., and James, J., concurred.

[Crim. No. 234. Second Appellate District.—April 4, 1912.]

Application of C. S. HEMSTREET for Writ of Habeas Corpus.

CRIMINAL LAW—SELLING AND GIVING INTOXICATING DRINK TO MINOR UNDER EIGHTEEN—SUFFICIENCY OF COMPLAINT—EXCEPTION OF PERSONS NOT NEGATIVED.—A complaint in a justice's court, under section 397b of the Penal Code, charging the defendant with selling and giving to a minor child under the age of eighteen years an intoxicating drink, is not insufficient because it fails to negative the exception stated therein, "that this section shall not apply to the parents of such children, or to guardians of their wards." The language of such exception in no wise purports to describe the offense specified, or to make such exception a part of the definition of the offense.

1D.—QUALIFICATIONS OF RULE AS TO NEGATING EXCEPTIONS IN CRIMINAL PLEADING—EXCEPTION NOT PART OF OFFENSE—MATTER OF DEFENSE.—The application of the rule requiring a criminal pleading to negative exceptions found in the statute should not be extended to include cases where it does not clearly appear that the exception constitutes a part of the enactment defining the offense; and when the exception is not a part of the definition of the offense, and in this way does not become a part of the enacting clause, its existence is a matter of defense.

1D.—RENDITION OF CRIMINAL JUDGMENT IN JUSTICE'S COURT—LAPSE OF TWO DAYS SUCCEEDING VERDICT—JURISDICTION—CURE OF ERROR—NEW TRIAL.—The rendition of a judgment in a criminal case in the justice's court more than two days succeeding the verdict was not an act in excess of jurisdiction, but was merely an error in procedure, which defendant was entitled to have reviewed upon appeal and a new trial granted on account of such error, and where he availed himself of his right to appeal to the superior court, which granted him a new trial, wherein judgment was properly rendered, he was thereby protected in every right to which he was entitled.

1D.—HABEAS CORPUS.—Where the defendant was properly convicted both in the justice's court and in the superior court upon appeal, he is not entitled to discharge upon writ of *habeas corpus* on account of any procedure had in the justice's court.

APPLICATION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Wallace W. Wideman, and Frank Herald, for Petitioner.

L. A. West, District Attorney, and A. E. Koepsel, Deputy District Attorney, for Respondent.

SHAW, J.—Petitioner was convicted upon a complaint filed in the justice's court charging him with selling and giving to a minor under the age of eighteen years an intoxicating drink in violation of section 397b of the Penal Code. The verdict of the jury finding him guilty was rendered on November 23, 1910, and the time for rendering judgment was, in the absence of any waiver on the part of petitioner, postponed to November 26th, at which time, over his objection, judgment was rendered. Petitioner appealed to the superior court which, on account of the failure of the justice to pronounce judgment within two days after the verdict, granted a new trial, upon which he was again convicted. He bases his right to be discharged from custody upon the grounds: First, that the complaint failed to state an offense; and, second, that jurisdiction of defendant and the subject matter of the action was lost by reason of the justice failing to pronounce judgment within the time fixed therefor by section 1449, Penal Code.

The alleged vice of the complaint is due to the fact that it did not negative the exception contained in section 397b. This section provides: "Every person who sells, gives or delivers to any minor child, . . . under the age of eighteen years, any intoxicating drink in any quantity whatsoever, . . . shall be guilty of a misdemeanor, . . . ; provided, that this section shall not apply to the parents of such children, or to guardians of their wards." The offense described in the enactment is the sale, etc., of intoxicating drinks to minors under the age of eighteen years. The language of the exception providing that the offense specified shall not apply to parents or guardians of such minors in no wise purports to describe the offense specified. "When an exception is stated in the statute, it is not necessary to negative such exception, unless it is a constituent part of the definition of the offense. . . . When the exception is not a part of the definition of the offense, and in this way does not therefore become a part of the enacting clause, it is a matter of defense." (*Territory v. Burns*, 6 Mont. 72, [9 Pac. 432].) The offense with which petitioner was charged was selling intoxicating drinks to a minor. The fact that parents or guardians were declared not within the operation of the statute was no part of the act defining the offense. An examination of the authorities convinces us the application of the rule requiring the complaint

to negative exceptions found in a statute should not be extended to include cases where it does not clearly appear that the exception constitutes a part of the enactment defining the offense. The subject is extensively discussed in *Ex parte Hornef*, 154 Cal. 355, [97 Pac. 891], where a number of authorities are reviewed. (See, also, *People v. Grinnell*, 9 Cal. App. 238, [98 Pac. 681].)

As to the second point, the rendition of judgment after the lapse of two days succeeding the verdict was not an act in excess of jurisdiction, but merely an error in procedure, which defendant was entitled to have reviewed on appeal and a new trial granted on account of such error. Section 1449, Penal Code, applicable to justices' courts, is almost identical with section 1191, applicable to like procedure in the superior court. By the amendment of section 1202 of the Penal Code, it was provided that, in case of a failure to pronounce judgment within the time required by section 1191, the trial court should, upon application therefor, grant defendant a new trial. If denied, the remedy is an appeal from the judgment, in the absence of which, however, the judgment remains in full force and effect as though rendered within the time prescribed. So far as affecting the jurisdiction of the court, this amendment is unimportant. Such was the ruling of the court in the case of *Rankin v. Superior Court*, 157 Cal. 189, [106 Pac. 718]. In our opinion, the court had jurisdiction of the defendant and subject matter of litigation, and therefore jurisdiction to pronounce judgment, though it might do so erroneously by failing to follow the statutory provision. Defendant availed himself of his right to appeal to the superior court, which granted him a new trial *de novo*, wherein judgment was properly rendered, thus protecting him in every right to which he was entitled.

The writ is denied and petitioner remanded to custody.

Allen, P. J., and James, J., concurred.

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[Civ. No. 917. Third Appellate District.—April 4, 1912.]

M. B. ELLIOTT, Appellant, v. ELBERT HUDSON, Receiver of LAKEPORT MILL AND LUMBER COMPANY, a Corporation, and D. A. RICE, Respondents.

CHATTEL MORTGAGE OF PLANING-MILL MACHINERY—SUBSEQUENT FIXTURES TO REALTY—PRECEDENCE OF REAL ESTATE MORTGAGES—WANT OF ACTUAL NOTICE OF CHATTEL MORTGAGE.—A mortgagee of real property, who took two mortgages thereon to secure different advances to the owner, upon which real property, at the time of their execution, a planing-mill plant was in operation, with its machinery, engine, boiler and other equipments permanently affixed to the realty, is entitled to precedence as to such fixtures over a prior chattel mortgage of the planing-mill machinery, executed and recorded, as such, before its attachment to the realty, where it appears that the mortgagee of the realty made his advances and took his mortgages without actual notice of the existence of the chattel mortgage.

1D.—LEGAL EFFECT OF VALID CHATTEL MORTGAGE AS SUCH.—So long as mortgaged personal property remains personal property and is not removed from the county where the chattel mortgage is recorded, the mortgagee is protected in his lien as against subsequent purchasers from the mortgagor, for they are charged with constructive notice of the recorded chattel mortgage. But when such property is affixed to land, a different question arises, though as between the chattel mortgagor and mortgagee the lien might not be thus defeated.

2D.—EFFECT OF CHATTEL MORTGAGE ON PLANING-MILL PROPERTY—WHEN AFFIXED TO REALTY—ABSENCE OF CONSTRUCTIVE NOTICE TO REAL ESTATE MORTGAGEE.—The mere fact that the mortgaged planing-mill property was of such a character as required it, for practical purposes, to be affixed to land, is not sufficient, after it has become attached to the realty, to put a subsequent mortgagee of the land upon inquiry as to the existence of the chattel mortgage, or to charge him with constructive notice thereof. Such subsequent mortgagee had the right to assume that he was purchasing real property, regardless of the fact that it was necessarily personal property before it was affixed to and became part of the land.

1D.—CONSTRUCTION OF CODE AS TO RECORD OF CHATTEL MORTGAGE.—Section 2963 of the Civil Code, which expressly requires chattel mortgages to be recorded in a separate volume, is to be construed, in relation to its further provision that mortgages of personal property may be acknowledged and recorded "in like manner as grants of real property," to mean that the chattel mortgage is constructive notice of what it contains, and cannot be regarded as notice in anywise affecting the title to real property.

ID.—NATURE OF RECORD OF CHATTEL MORTGAGE AND OF REALTY—DUTY OF SEARCH.—A chattel mortgagee is chargeable only with notice of a prior recorded chattel mortgage on the same property, and he is not required to look to the record of the deeds or mortgages of realty for prior encumbrances. And so, also, a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records of chattel mortgages, as he is not affected by the record of a chattel mortgage upon fixtures of the realty, and a purchaser or mortgagee of the realty need only inquire for liens on real estate.

ID.—COMMENT OF SUPREME COURT IN ORDER DENYING REHEARING.—The supreme court in its order denying a rehearing approves of the ruling that a purchaser or mortgagee of land need not examine the record of chattel mortgages in so far as it applies to chattels of the character involved in this case. Upon the question whether it applies to all property mortgageable as chattels, including growing crops, no opinion is expressed, as it is not involved in this case.

ID.—UNTENABLE REPLEVIN BY CHATTEL MORTGAGEE—FINDING—PRIORITY OF REAL ESTATE MORTGAGES.—The chattel mortgagee cannot maintain an action of replevin to recover the possession or value of the planing-mill machinery mortgaged which was affixed to the land, as against the mortgagee of the land, who had purchased the same at a sale under foreclosure, and had taken his mortgages without actual knowledge of the existence of the chattel mortgage. It is held that the court was justified in finding in such action that the real estate mortgages took priority over the chattel mortgage.

ID.—FORECLOSURE OF MORTGAGES—RECEIVER OF RENTS AND PROFITS—DISPOSITION—DEFICIENCY JUDGMENT ASSIGNED—RIGHTS LIMITED TO PURCHASER—REVERSAL.—Where a receiver, appointed during foreclosure of the real estate mortgages, to receive the rents and profits of the mortgaged land, settled his accounts after the mortgagee had purchased the property under the decree, and taken a deficiency judgment against the corporation mortgagor, which had assigned all of its property to a trustee for the benefit of its creditors, and after the deficiency judgment of the mortgagor had been assigned to the same trustee, it is held that the court erred in applying the rents and profits upon such deficiency judgment, and that the judgment must be reversed, in so far as to direct the court to ascertain and apply only such portion of the rents and profits as belonged solely to the purchaser at the sale.

ID.—JUDGMENT IN FORMER ACTION NOT PLEADABLE IN BAR—RECEIVER SUED INDIVIDUALLY—DIFFERENT PARTIES.—A judgment in a former action of the same general character brought by the same plaintiff against the real estate mortgagee and the receiver, sued individually, in which the plaintiff was nonsuited as to the mortgagee, and judgment was rendered against the plaintiff in favor of the receiver as an individual, cannot be pleaded in bar of the present action against

the mortgagee individually and the receiver sued in his official capacity, who is not the same person as when sued individually, and who is not liable in his individual capacity. A judgment, to be a bar, must be between the same parties, in the same capacity, and must be "in respect of the matter directly adjudged."

APPEAL from a judgment of the Superior Court of Mendocino County, and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Preston & Preston, and J. E. Pemberton, for Appellant.

C. M. Crawford, and Mannon & Mannon, for Respondents.

CHIPMAN, P. J.—In appellant's opening brief he states that but two questions are presented:

"1. Is a chattel mortgage regularly executed and recorded, covering property allowed by statute to be chattel mortgaged, and that still remains in the county, defeated by a real estate mortgage, subsequently executed upon property to which the chattels had become attached, the chattels being of such character as to be worthless unless attached to real estate?"

"2. In a foreclosure case where the rents, issues and profits are mortgaged and foreclosed, and a receiver appointed, but where there is no deficiency judgment, can the purchaser at foreclosure sale claim rents, issues and profits, by virtue of his purchase, that were collected prior to foreclosure?"

Defendant Hudson paid into court the funds held by him as receiver and was dismissed from the action, and defendant Rice was substituted in his place. Judgment passed that plaintiff take nothing by his action and that defendant Rice recover judgment for \$458.63, being the amount of money turned over by the receiver. Plaintiff appeals from the judgment and order denying his motion for a new trial.

1. The action is for the recovery of possession or the value of certain planing-mill machinery, namely, a steam engine and boiler and certain mill machinery which plaintiff claimed were the subject of a chattel mortgage executed to him by C. E. and P. M. Beach, on April 29, 1905, recorded as a chattel mortgage May 23, 1905. Beach Brothers installed the prop-

erty on a certain lot in the town of Lakeport. Subsequently they formed a corporation known as the Lakeport Mill and Lumber Company, the Beaches being the principal but not all the stockholders therein, and removed the property in question to another lot in the town, across the street from where it was first used. The title to the lot to which the property was removed stood in the name of the corporation. On February 27, 1907, after the said machinery had been installed on this other lot, the corporation mortgaged the premises to defendant Rice to secure the payment of certain money loaned to the corporation by Rice, and, April 23, 1907, the corporation made a second mortgage to defendant Rice to secure a further loan of money, and, on May 20, 1907, a mortgage was made by the corporation to replace the first of the above mortgages to correct some informality or defect therein. These mortgages were duly recorded shortly after their execution. The court, on sufficient evidence, made the following finding:

"That at the date of each of the said mortgages all the personal property set forth and described in paragraph VI of plaintiff's complaint herein was firmly affixed and attached to the real property described in and covered by each of said mortgages in such manner that it became and was a part of said real property and was covered and mortgaged by each of said mortgages, and was included in and covered by the judgment and decree of foreclosure and sale and the sale thereunder as hereinbefore set forth."

Defendant Rice testified that when he took his mortgages he was shown the property by one of the Beaches as it then stood with the machinery affixed to the land, as the property to be mortgaged; that he had no knowledge or notice or information that there was a chattel mortgage on the machinery, and that he understood he was getting, as security for his loan, the property as it then appeared with the affixed machinery. There were some loose tools to which he makes no claim, but we do not understand that any point arises as to these. The only notice or knowledge he had of the chattel mortgage was such constructive notice as was imparted by its recordation. Hence arises the first question presented by appellant.

"Grants, absolute in terms, are to be recorded in one set of books, and mortgages in another." (Civ. Code, sec. 1171.)

"Except as it is otherwise in this article provided, mortgages of personal property may be . . . recorded in like manner and with like effect as grants or (of) real property; but they must be recorded in books kept for personal mortgages exclusively." (Id., sec. 2963.) "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value; unless: . . . 2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property." (Id., sec. 2957.) Instruments affecting the title to real property duly executed, acknowledged and recorded impart notice of their contents (Id., secs. 1207 and 1213); and an "unrecorded instrument is valid between the parties thereto and those who have notice thereof." (Id., sec. 1217.) There seems to be no provision of the code expressly making the recordation of a chattel mortgage constructive notice of its contents. Constructive notice is that "which is imputed by law" (Id., sec. 18); and "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiries he might have learned the fact." (Id., sec. 19.) Section 2963, Civil Code, *supra*, gives the recordation of a mortgage of personal property like effect with that of grants of real property, and without doubt persons about to purchase personal property which is the subject of a chattel mortgage would be charged with constructive notice of a recorded mortgage of such property if it were not at the time part of realty.

The statute enumerates certain classes or kinds of personal property and prescribes the conditions on which it may be made the subject of lien by chattel mortgage. So long as it remains personal property and is not removed from the county where the mortgage is recorded the mortgage is notice to all the world, and the mortgagee is protected in his lien as against subsequent purchasers from the mortgagor, for they are charged with notice of the mortgage. But when this same property has been permanently affixed by the mortgagor to land and its character has been changed from personalty to realty, a different situation arises. As between the mortgagor and the mortgagee the lien might not be thus defeated. But that is not the case here. Appellant claims that because the

personal property in the present case was such as required it, for practical purposes, to be affixed to land, this fact alone was sufficient to put the respondent on inquiry and made the chattel mortgage constructive notice to him. We cannot give this fact such compelling force. We think that the purchaser of a town lot on which, at the time, there is a building containing a planing-mill plant in operation, with its machinery, engines and boilers and other equipment permanently attached to the land, would have the right to assume that he was purchasing real property regardless of the fact that this equipment was necessarily personal property before it was attached to and became part of the land. The question here must be solved in the light of the facts. Had respondent searched the records of deeds, as was his duty, he would have found, what is conceded, that title to the lot was in the corporation, and nothing more. As he was purchasing from the corporation, had he searched the records of chattel mortgages for the name of the corporation as mortgagor, he would not have discovered the mortgage, for it was not made by the corporation. The statute, as we have seen, requires mortgages of personal property to be separately recorded and in a different book from the record of deeds. The record is constructive notice of transactions authorized to be made matter of record therein but no further. That is to say, the record is constructive notice that the property mortgaged is personal property falling within the class made the subject of chattel mortgage.

In *Watkins v. Wilhoit*, 104 Cal. 395, [38 Pac. 53], an assignment was made for the benefit of creditors of all the assignor's real and personal property and was filed for record and recorded in a book entitled "Book G Miscellaneous." A creditor of the assignor subsequently obtained judgment against the assignor, and his contention in the case was that, being a nonconsenting creditor, and the assignment having included real property, it was void as to him, because it was not recorded in accordance with the provisions of article IV of the Civil Code, sections 1213-1217 and 3466. Speaking through Chief Justice Beatty, the court said: "The whole object of article IV of the chapter on recording transfers is to prescribe the effect of failing to record upon *subsequent purchasers or mortgagees*. An assignment of real property

for the benefit of creditors ought to be subject to these provisions as much as any other transfer of real property, because it is as much within the policy of the statute as any other transfer of such property. Subsequent purchasers and mortgagees are entitled to the same notice in one case as in the other, and have a right to rely on the same means of knowledge as to the true state of the title when parting with value on the faith of the apparent ownership. But with respect to the creditors of the assignor who do not part with anything, the case is totally different and they are not within the policy of these provisions. A transfer may be valid as to them although void as to subsequent purchasers in good faith for value." It is then shown that assignments for the benefit of creditors are not required to be recorded as prescribed in chapter IV, *supra*, but in accordance with sections 3463 and 3464 of the Civil Code. Thus, an assignment of real property for the benefit of creditors is not notice to mortgagees of such property by virtue alone of its being recorded as prescribed by the statute, although it is notice as to creditors. Said the court: "To determine what will give such constructive notice [i. e., notice of the transfer of real property] we look to section 1213 et seq. of the Civil Code, but to determine what is recording without reference to the question of notice to subsequent purchasers, we look to section 1170 of the Civil Code," which requires only that the instrument, duly acknowledged, be "deposited in the recorder's office, with the proper officer."

If it be true, as said in the opinion, that "to determine what will give constructive notice" of the transfer of real property "we look to section 1213 et seq. of the Civil Code"—i. e., to the sections embraced in article IV—it must follow that the purchaser need look no further unless, as in the cases of mortgages of real property, which are "conveyances" (section 1215), some statute requires it, and we have no such statute. In speaking of sections 1170 and 1213, the court said, in *Cady v. Purser*, 131 Cal. 552, 556, [82 Am. St. Rep. 391, 63 Pac. 844]: "Each must be construed with reference to the purposes for which it was enacted." That is, a conveyance of real property is deemed to be recorded where it complies with the provisions of section 1213. And so of a chattel mortgage; and, when the statute says, as in section 2963, Civil Code, that mortgages of personal property may be acknowledged and re-

corded "in like manner and with like effect as grants of real property," it means that the chattel mortgage is constructive notice of what it contains, and cannot be regarded as notice in any wise affecting the title to real property. Possession by the mortgagee of mortgaged personal property is not essential to the validity of his mortgage. In examining the record for prior encumbrances must he look to the record of deeds of realty? We think not. And if he looked, what would he find but evidence of the transfer of land and its improvements undescribed? Conversely, the purchaser of land need not look to the record of chattel mortgages.

Chattel mortgages are to be distinguished from conditional sales where title remains in the seller until the article is paid for. Mr. Jones gives considerable attention to the subject. Pointing out that there is some conflict of authority, he says: "The better opinion is that a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records of chattel mortgages, for he is not affected by the record of a chattel mortgage upon fixtures of such realty." (Jones on Chattel Mortgages, sec. 184.) In *Pierce v. George*, 106 Mass. 78, [11 Am. Rep. 310], the owner of a machine-shop gave a chattel mortgage on the machinery therein, before it was set up, but in contemplation that it should be set up and attached to the building. He afterward, and after it was set up, gave a mortgage on the land and building. *Held*, that the second mortgagee could hold the machinery against the first mortgagee. (Syllabus.) (*Brannan v. Whittaker*, 15 Ohio St. 446; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, [13 N. E. 493]; *Rowland v. West*, 62 Hun, 583, [17 N. Y. Supp. 330].) Mr. Bronson, in his work on Fixtures, at section 70a, says: "Constructive notice is not given to a mortgagee of the realty in respect to an existing chattel mortgage upon articles attached to the realty by filing and recording the same as a chattel mortgage, for a purchaser or mortgagee of real estate need only inquire for liens on real estate. The record of a chattel mortgage is constructive notice only of an encumbrance on chattels."

The case of *Tibbets v. Moore*, 23 Cal. 208, relied on by appellant, was a case where the mortgagor mortgaged a quartz-mill. He afterward purchased a steam engine and boiler and

gave a chattel mortgage thereon and so placed the machinery in the quartz-mill that it became a part of the realty. It was held that the chattel mortgage took priority. The court seems to have placed its decision on the fact that the mortgage on the quartz-mill was recorded before the boiler and engine were attached to the mill and formed no part of the security then looked to by the mortgagee. It further appeared as of some apparent consequence, for the court said: "Both mortgages are executed and recorded as chattel mortgages under the statute; and treating them in that character, there can be no doubt that the Lombard mortgage [the chattel mortgage] has priority over the other so far as relates to the property included in it."

Our conclusion is that the trial court was justified in finding that defendant Rice's mortgage took priority over plaintiff's chattel mortgage.

The rule may work hardship in some cases, but when we consider the numerous classes and kinds of personal property which, by the statute, are made the subject of chattel mortgage and the difficulty that may arise in many cases in identifying the personal property purported to be mortgaged as the same has been affixed as part of the realty, there would seem to be much to commend the rule as Mr. Jones states it. In *Brannan v. Whittaker, supra*, the court said: "It devolved upon the chattel mortgagee who sought to change the legal character of the chattels after they were annexed to the realty, either to pursue the mode provided by law for encumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such encumbrance, or otherwise to take the risk of a loss in case it should be sold and conveyed as a part of the real estate to a purchaser without notice."

2. It appears from the findings that defendant Rice commenced his action to foreclose the mortgages executed by the Lakeport Mill and Lumber Company, on October 25, 1907, in which action the Lakeport Mill and Lumber Company, M. B. Elliott, plaintiff in the present action, the Collier Brothers, copartners, and George J. Foutch were defendants. On September 16, 1908, Rice, as plaintiff, recovered judgment and, on January 9, 1908, defendant Hudson was appointed receiver in said foreclosure action. He qualified as such re-

ceiver on January 14, 1908, and acted in that capacity until April 18, 1910, and collected the rents, issues and profits of the mortgaged premises, including the property here in dispute, amounting to the sum of \$458.63 after deducting the expenses of his administration as allowed by the court, which said sum is one of the subjects of the present controversy. The court further found that, on January 4, 1909, Rice became the purchaser of the mortgaged premises at sheriff's sale; that a deficiency judgment for \$528.17 was docketed in his favor which remains unpaid; "that defendant Rice is entitled to have the moneys on deposit in this action applied on account of said deficiency judgment"; that, since the commencement of the present action, and on the second day of January, 1910, the said Rice "received a sheriff's deed for the whole of the property covered by the two mortgages aforesaid; that thereupon he became the owner in fee and seised in fee, in the possession and entitled to the possession of all of the real property covered by the said two mortgages, including the property described in paragraph VI of plaintiff's complaint, all of the latter being affixed and attached to and a part of said real property." The court also found as follows: "That the plaintiff herein was, at the date of commencement of the said foreclosure action [October 25, 1907], the owner of the unexpired portion of a leasehold estate for two years from and after October 8, 1907, in the real property in the county of Lake, state of California, upon which said personal property was situated, but that said leasehold estate was subject to and subordinate to the liens of the said two mortgages hereinabove referred to, and was foreclosed in the said action brought to foreclose said mortgages."

The court also found that in the decree of foreclosure was the following reservation: "All respective adverse claims of plaintiff and of defendant M. B. Elliott, in and to the engine, boiler and machinery described in the answer of said defendant, are not determined or adjudicated in this action, or by this decree, but are expressly reserved.

"But all rights of said defendant, Elliott, as lessee in and to the lot described in the complaint (exclusive of said boiler, engine and machinery), are found and adjudged to be subsequent and subject to plaintiff's mortgages, and are foreclosed hereby, while the question whether or not, as between

the parties to this action, said boiler, engine and machinery form part of the realty, is also expressly reserved.

"The rights of said defendants, Page B. Collier and William B. Collier, Jr., in and to the part of the premises described in their answer, arising out of any matter prior in date to the execution of plaintiff's mortgages (if any such rights they have), are not adjudicated or determined in this action or by this decree, but are expressly reserved."

It further appeared that, on March 5, 1909, a settlement agreement was entered into between the Lakeport Mill and Lumber Company and the Beaches on the one part and the creditors of the said corporation on the other part, whereby the corporation assigned all its property to Herbert V. Keeling as trustee for the benefit of all its creditors. Among the creditors who assigned their claims was defendant Rice in the amount of \$528.17, which is the exact amount of his deficiency judgment in the foreclosure suit. Among other paragraphs in this assignment is the following:

"Fourth. That no claim be made by said creditors to the rents of the mortgaged premises heretofore foreclosed in the superior court of the county of Lake, state of California, in the action of *D. A. Rice v. Lakeport Mill and Lumber Company et al.*, and which said rents are now in the hands of, or may hereafter be received by, a receiver heretofore appointed by said superior court, saving and excepting such claim hereto as the said D. A. Rice may have by virtue of his right thereto (thereto!) as the purchaser of said mortgaged premises at the foreclosure sale."

It does not distinctly appear that defendant Rice's claim of \$528.17 represented his deficiency judgment, but as he had no other claim and as the amounts are identical, it is not to be doubted that they are the same, and this seems not to be questioned.

Some controversy has arisen over the meaning of this fourth paragraph of the assignment, respondent claiming that "it was intended by Rice to reserve all his rights to the fund now in the hands of the court, and the trial court, after hearing all of the witnesses and documentary evidence before it, found that said assignment did not prejudice Rice's right in said deficiency judgment." Rice testified as follows: "I purchased this property at a foreclosure sale . . . and I took a deficiency

judgment. . . . Since that time the deficiency judgment has been settled. I signed my rights all away to it. There is no deficiency judgment in my favor against anybody." It seems to us that Mr. Rice took the correct view of his own agreement and that his deficiency judgment was duly transferred to trustee Keeling. Rice reserved only his rights as purchaser under the foreclosure sale, which are no greater than if a stranger to the action were the purchaser. The trial court adjudged that he was entitled to the funds turned over by the receiver, which represented the rents, issues and profits of the property—both the lot proper and the disputed personal property—by virtue of his deficiency judgment and not as a purchaser at the foreclosure sale. In this we think the court was in error. He no longer had any rights as a deficiency judgment creditor, for they passed to the trustee, and what, if any, rights he had to this fund as a purchaser at the foreclosure sale are not ascertained or found by the court. Whether or not Rice's proportion of the funds as such purchaser can be ascertained from the record, as it now stands, would be difficult to determine, and, if it could be determined, we have no power to make a finding as to the amount.

3. The record contains a copy of the judgment-roll in an action commenced by this plaintiff against Hudson in his individual capacity and defendant Rice. The purpose of that action seems to have been the same as in the present action. The judgment was in favor of defendant Hudson, and a judgment of nonsuit was entered as to Rice and it is now pleaded in bar. Subsequently the court granted leave to plaintiff to bring the action against Hudson in his capacity of receiver and that is the present action. We do not think the judgment in the former action was a bar to this action. Hudson, individually, is not the same person as Hudson receiver. Among other requirements of a judgment pleaded in bar is this: that the action must be between the same parties in the same capacity and the judgment must be "in respect to the matter directly adjudged." (Code Civ. Proc., subd. 2, sec. 1908; *Laguna etc. Dist. v. Charles Martin Co.*, 5 Cal. App. 172, [89 Pac. 993]; *Hughes v. United States*, 4 Wall. 232, [18 L. Ed. 303].) That a receiver is not liable in his

individual capacity was decided in *Tapscott v. Lyon*, 103 Cal. 305, 306, [37 Pac. 225].

The judgment is affirmed except in so far as it adjudges the funds turned over by the receiver to belong to defendant Rice, and, as to such funds, the judgment is reversed and the trial court is directed to ascertain to what portion, if any, of such funds Rice is entitled as purchaser at the foreclosure sale and render judgment accordingly, each party to pay his own costs incurred on this appeal.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 3, 1912, and the following opinion then rendered thereon:

THE COURT.—The petition for hearing in this court is denied.

We are satisfied with the rule stated in the opinion of the district court of appeal, to the effect that a purchaser or mortgagee of land need not examine the record of chattel mortgages, so far as it applies to chattels of the character involved in this case. Whether or not the rule applies to all property mortgageable as chattels—growing crops, for example—is a question not involved in this case, and upon which we express no opinion.

[Civ. No. 932. Third Appellate District.—April 6, 1912.]

A. J. RAISCH, Respondent, v. CHARLES A. WARREN, JR., Administrator of Estate of CHARLES A. WARREN, Deceased, WILLIAM T. WARREN, CHARLES A. WARREN, JR., WILLIAM T. WARREN, as Guardian of the Person and Estate of HENRY O. WARREN, a Minor, BERTHA WARREN, CLAUDINE WARREN, CHARLES A. WARREN COMPANY, a Corporation, and A. E. BUCKMAN, Defendants; CHARLES A. WARREN, JR., Appellant.

ACTION FOR PARTNERSHIP ACCOUNTING—CORPORATIONS USED AS INSTRUMENTALITIES—GIFT OF STOCK BY DECEASED PARTNER TO HEIRS—EQUITY JURISDICTION AND RELIEF.—A complaint in an action for an accounting and settlement of a partnership between plaintiff and one of the defendants and a deceased partner, which shows that the corporation defendant and another corporation named were used as instrumentalities of the partnership in carrying on construction work for the United States, and that the deceased partner is largely indebted to the partnership, but had caused his shares of stock in such corporation to be transferred to his heirs as a gift *causa mortis*, states a ground for relief in equity as against such administrator and heirs, and they may be restrained from disposing of such stock pending the settlement of the partnership accounts.

Id.—VENUE OF EQUITY ACTION—PRESUMED PROCEDURE UPON JUDGMENT. Such action in equity for an accounting of the partnership may be brought and tried in the superior court of a county other than that in which the estate is being administered. But if, upon the trial, anything is found due from the estate, it is to be presumed, if no ground in equity appears for a different procedure, that the court would be guided by section 1504 of the Code of Civil Procedure, in formulating its judgment, whereupon a certified transcript of the original docket of the judgment would be filed among the papers of the estate in the county in which the estate is being administered.

Id.—JURISDICTION OF SUPERIOR COURTS IN EQUITY COEXTENSIVE.—All of the superior courts have like original jurisdiction "in all cases in equity," and their process extends "to all parts of the state." The superior court of the city and county of San Francisco has the same jurisdiction in equity as the superior court of Alameda county, in which the estate is being administered; and if the action in equity could be maintained in the latter county, there is no reason why it may not be prosecuted in the former. So far as jurisdiction in equity is concerned, the two counties stand upon the same footing.

ID.—QUESTION OF CHANGE OF VENUE—RIGHT TO BRING ACTION IN ANOTHER COUNTY UNAFFECTED.—Even if the right should exist to have the action in equity tried in Alameda county, such right is not to be confounded with the right to bring the action in the superior court of the city and county of San Francisco.

ID.—POWER IN EQUITY TO ENFORCE RELIEF—PARTIES BEFORE COURT—INJUNCTION AGAINST DIVERSION OF STOCK—POWER NOT LIMITED BY PROVISION FOR JUDGMENT.—Where the action in "equity" involves the assumption that the estate of plaintiff's deceased copartner will be shown to be indebted to plaintiff and his assignor, another copartner, on a fair accounting, in a large sum of money, that the inventoried estate is wholly insufficient to meet the claim, and that the administrator and heirs who are before the court have possession of corporate stock of great value, which rightfully belongs to the estate, and should be applied to the judgment upon such accounting, and that its diversion therefrom should be enjoined, it cannot be maintained that such scheme must collapse and the injunction must fall, by the limitation of the court's power under section 1504 of the Code of Civil Procedure. The court's power in equity is not limited by that section.

ID.—POWER OF EQUITY TO MAKE RELIEF COMPLETE—ORDER FOR SALE OF STOCK AND DISPOSAL OF PROCEEDS.—When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case. It may order the sale of the shares of stock which have been wrongfully placed in the custody of the administrator and heirs, and their proceeds applied to the payment of the creditors of the estate, including the plaintiff, when his claim to payment is established; or it may order the administrator, who is a party defendant before the court, to take possession of such shares of stock, and to sell the same and apply the proceeds to the payment of creditors of the estate. The court will not be left with its hands tied, without power to make any disposition of the stock to satisfy the plaintiff's claim.

ID.—NATURE OF ACTION—NOT A CREDITOR'S BILL—PARTNERSHIP ACCOUNTING—INCIDENTAL RELIEF.—The action cannot be strictly called a creditor's bill; but it is an action in equity for an accounting of the affairs of a partnership, which the administrator has no power to adjust, and incidentally to cause property belonging to a deceased partner to be subjected to administration for the benefit of plaintiff, as a creditor, and other creditors of the estate. The fact that at the beginning of the action the plaintiff's claim was not reduced to judgment cannot preclude incidental equitable relief to prevent the diversion of such property, which the administrator and heirs wrongfully claim as their own, since if the plaintiff was deprived of access thereto he would be remediless.

ID.—LIMITED POWER OF PROBATE COURT—RELIEF IN EQUITY COURT.—The superior court sitting in probate cannot go into an accounting

of a copartnership, nor determine the ownership of shares of stock which are as yet no part of the estate, and in respect of which the administrator refuses to take steps necessary to determine their ownership. The equity court alone can and will afford relief where the powers of the probate court are inadequate to do justice.

Id.—INJUNCTION JUSTIFIABLE—DISCRETION.—The injunction was justifiable where the facts show that by no other means could the property have been preserved to await the result of the accounting. Where an injunction is justifiable, the issuing of the writ is, in a large degree, a matter of discretion, which should be exercised in favor of the party most likely to be injured.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to dissolve and vacate an order of injunction. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Aylett R. Cotton, and Aylett R. Cotton, Jr., for Appellant.

Peter F. Dunne, and C. H. Wilson, for Respondent.

CHIPMAN, P. J.—Injunction. Upon filing the complaint and executing a bond for \$1,000, the court granted the prayer of the complaint for an injunction, further ordering that defendants show cause at a date named "why this order should not be continued in force until the further order of the court in the premises." Before the hearing thus ordered, defendant, Charles A. Warren, Jr., served and filed his motion to dissolve and vacate said order of injunction, based on the complaint in said action and upon the ground that "said complaint does not state or show that any ground or cause exists or has existed for the making of said order or for the granting of any injunction in this action."

At the hearing the court ordered: "1. That the demurrers to complaint be overruled ten days to answer; 2. Motion to dissolve injunction denied; 3. Motion to appoint receiver denied without prejudice to renewal of motion." It appears from the record that "Said order included the decision of said court upon motions of other parties, as well as said motion of said Charles A. Warren, Jr., and also decisions of demurrers."

Defendant, Charles A. Warren, Jr., excepted to the order denying his motion "to dissolve said order of injunction and

refusing to dissolve said order of injunction as to him." He alone appeals "from the order made and entered . . . refusing to dissolve the injunction granted on the twenty-seventh day of January, 1910, . . . and denying said defendant's motion to dissolve said injunction."

The averments of the complaint are substantially as follows: That on March 1, 1903, Charles A. Warren, the defendant Buckman and plaintiff formed a partnership for the purpose of securing contracts from the United States government and performing said contracts when secured, relating to what is known as the Truckee-Carson Project of Nevada, and that said partnership continued until the death of said Charles A. Warren, which is alleged to have occurred on December 24, 1908; that defendant C. A. Warren Company now is and, since April 2, 1903, has been a duly organized California corporation, as also is and has been the San Francisco Construction Company, since January 8, 1900; that from the beginning of said partnership to its termination aforesaid "the two corporations last mentioned were controlled, operated and used by such partnership to facilitate, carry on and advance the affairs, work and business of said partnership, and acting for and under the direction of said copartners, did duly make to the Secretary of the Interior of the United States certain proposals for doing the construction work in connection with the aforesaid Truckee-Carson Project of Nevada"; that said proposals were accepted and pursuant thereto said corporation, C. A. Warren & Company, "for the purposes aforesaid and acting for and under the direction of said copartners, and as an instrument of said partnership to facilitate and carry on its business, did duly make and enter into a certain contract with the United States," engaging to perform certain work relating to said project, for which the said United States agreed to pay said corporation certain sums of money and that said corporation fully completed said work. Then follow averments that the said corporation, the said San Francisco Construction Company, for purposes as above averred, and acting for said copartnership as above averred, entered into another contract with the United States to further prosecute the work on said project, for which the said United States agreed to pay said corporation certain sums of money, and that "said

copartners, doing business as such in the name of said corporation, San Francisco Construction Company, did duly . . . complete the contract last aforesaid." Then follow also averments relating to a third contract entered into by said last-named corporation for like purposes as above set forth and as in other alleged cases, "acting for and under the direction of said copartners," and "for the purpose of facilitating, carrying on and advancing the affairs, work and business of said partnership"; that defendant, Charles A. Warren, Jr., was duly appointed administrator of the estate of Charles A. Warren, deceased, on January 15, 1909; that defendant Buckman assigned to plaintiff all his right and interest in and to all demands against the estate of Warren, deceased, but now claims some interest in the assets of said partnership; that there has never been an accounting between said copartners as to its business, nor has there been an accounting between the surviving members and defendant Charles A. Warren, Jr., the administrator of said estate of said deceased copartner; "that should an accounting be had of the aforesaid copartnership matters and business, it will be found and ascertained that a large sum of money, to wit, the sum of about \$150,000 is due from the estate of said Charles A. Warren, deceased, on account of said copartnership matters and business, to this plaintiff"; that plaintiff has demanded of defendant Warren, Jr., administrator of the estate of Warren, deceased, and of defendant Buckman, an accounting of said copartnership business, but said defendants have refused and still refuse to make such accounting; that plaintiff, within the time allowed by law therefor, prepared his contingent claim against the estate of said deceased in which was recited "substantially all the matters aforesaid and stated the particulars of said contingent claim, and demanded that an accounting be had forthwith between this plaintiff and the said administrator of the estate of Charles A. Warren, deceased, and that provision be made for the payment of such sum as may be found to be due this plaintiff on such accounting, and that such payment be made from and out of the assets of the estate of said deceased"; that said administrator rejected said contingent claim; that said administrator has duly returned an inventory of said estate showing the same to be of the value of \$8,798.66; that said inventory does not show the true value and character

of the entire estate left by deceased; that the said corporation, the Charles A. Warren Company, had a capital stock of \$100,000, divided into 100,000 shares of the par value of \$1 each, of which deceased, at the time of his death, was the owner of 60,416 shares; that, immediately before his death, said Warren delivered all his said shares to one Haskell, with instructions that, in the event of the death of said Charles A. Warren, Haskell "should then, and in that event only, deliver said capital stock to the defendants herein, William T. Warren, Charles A. Warren, Jr. and Henry O. Warren in equal shares"; but should he survive his then illness, said capital stock was to remain the property of said Charles A. Warren, "who was to repossess the same and enjoy the income thereof and have all the rights and benefits arising from the ownership thereof"; that, after the death of said Warren, said capital stock was delivered by said Haskell as directed by said Warren, and the said transferees aforesaid are now the holders thereof, and that the defendants Bertha and Claudine Warren claim some interest therein; "that said capital stock is of great value, to wit, of the value of about \$1,000,000, and that the same is a part of the estate of said Charles A. Warren, deceased, and is subject to the payment of the debts proven and allowed against said estate"; that said estate of Warren, deceased, and said William T., Charles A., Jr., Henry O., Bertha and Claudine Warren "have not sufficient property out of which to pay plaintiff's claim, unless resort be had to that represented by the capital stock of said Charles A. Warren Company; that, except for said shares of capital stock and the value thereof, the said Warrens [naming them] are each and all of them financially irresponsible"; that they have threatened to sell said shares, in which event "they and each of them would be wholly unable to deliver to Charles A. Warren, Jr., administrator of the estate of Charles A. Warren, deceased, sufficient of the property of said deceased or sufficient money or property of any kind to pay the amount due from said estate to this plaintiff on his aforesaid claim, and that should said sale or disposition of said stock be made, this plaintiff "would be wholly without remedy in the premises and would suffer great or irreparable injury"; that defendant, William T. Warren, was by order of court duly appointed

guardian of the person and estate of defendant Henry O. Warren, a minor.

Plaintiff prays for an accounting of all matters relating to said copartnership; for judgment against said administrator for the amount that may be due plaintiff on such accounting; for a writ of injunction enjoining the sale of said capital stock; for the appointment of a receiver and such further relief as may be just.

At the hearing of the motion there were read the affidavits of plaintiff and one Church. Plaintiff's affidavit is to like effect as the complaint in the action; he also deposes that the inventory returned by said administrator does not include said shares of said capital stock; that, in the transfer of said stock to said Haskell, "the said Warren did not part with all dominion over the same or pass the same beyond his control for all time, and, furthermore, that said gift was subject to defeasance in favor of said Warren's creditors, and that as to this affiant, a creditor of said Warren, said gift of said capital stock is wholly void." The affidavit of Church, used at the hearing of the motion, was to the effect that he was a director of the Charles A. Warren Company from its organization to the death of Charles A. Warren; that the affairs of the corporation were "controlled, directed and managed wholly and entirely by said Charles A. Warren"; that, with the exception of the five shares each issued to the directors, Warren controlled all the shares; that "the business, property and affairs of said Charles A. Warren were, from the time of the incorporation of said corporation to the twenty-fourth day of December, 1908, from time to time during said period, transferred from said Charles A. Warren to said corporation"; that "at all times from the date of the incorporation thereof to the time of his death, he, the said Charles A. Warren, received the entire income of said corporation and used and disposed of the same as his personal property and according to his personal will and wishes"; that no dividends were declared, but that all of the funds of the corporation and all its earnings were personally controlled by said Warren; that, "according to the best judgment and knowledge of this affiant, all the property owned by said corporation and all the stock thereof were a part and portion of the estate of Charles A. Warren at the time of his death, on or about December 24, 1908."

The estate of Charles A. Warren, deceased, is being administered in the superior court, sitting in probate, in Alameda county, and this action was commenced and is pending in the superior court of the city and county of San Francisco.

Appellant contends that, "under section 1504, Code of Civil Procedure, in an action of this nature, the court has no jurisdiction to provide for the payment of any judgment, and hence no jurisdiction to make any investigation as to what property may belong to an estate, or to make an order enjoining the disposition of, or appointing a receiver of, any property." The argument seems to be that, under section 1504, *supra*, the judgment only establishes the claim in the same manner as if allowed by the administrator, and the judgment must be that the administrator pay in due course of administration; "that there is no administration running its course in the city and county of San Francisco, where this action is, and it is only the superior court in Alameda county, in which the estate is being administered, that can make application of the assets of the estate so as to pay in the due course of administration"; that the superior court of the city and county of San Francisco "has no jurisdiction to take action, even after judgment, to enforce payment of any judgment; and surely has no jurisdiction to issue an injunction before judgment to restrain the disposition of property"; that a judgment upon a rejected claim is no more effective than a claim allowed by an administrator or the judge; citing *Hall v. Cayot*, 141 Cal. 13, 16, [74 Pac. 299]. Appellant then takes up the general proposition, to which the brief is mainly devoted, that "it is contrary to all the authorities to attempt to interfere, by injunction or otherwise, with the disposition of property before judgment is obtained, unless the plaintiff has some lien on the property or interest therein," and none is here alleged. In support of this contention, adjudicated cases and opinions of text-writers are cited from which the general rule is deducible that a simple contract creditor, or a creditor at large, whose claims are not yet reduced to judgment, cannot maintain a creditor's bill. (Citing 2 High on Injunctions, 4th ed., secs. 406, 1403; 6 Pomeroy's Equity Jurisprudence, sec. 882; *Ohm v. Superior Court*, 85 Cal. 545, [20 Am. St. Rep. 245, 26 Pac. 244] [approved in *Field, Admr., v. Andrada*, 106 Cal. 107,

[39 Pac. 323]; and *Shiels v. Nathan*, 12 Cal. App. 604, [108 Pac. 34].)

On the question of jurisdiction generally, the code provides that superior courts "have original jurisdiction in all cases in equity" (Code Civ. Proc., sec. 76); and their process extends "to all parts of the state." (Id., sec. 78.) The superior court of the city and county of San Francisco has the same jurisdiction as the superior court of Alameda county, and if the action can be maintained in the latter court, we can see no reason why it may not be prosecuted in the former. The suggested difficulty of enforcing a judgment, should plaintiff recover, in the San Francisco court, is fanciful rather than real. If, on the trial, anything is found to be due plaintiff by the estate of Warren, deceased, it is to be presumed that the court would be guided by section 1504, Code of Civil Procedure, in formulating its judgment, whereupon "a certified transcript of the original docket of the judgment" would be "filed among the papers of the estate in court," i. e., in the Alameda county court, as the said section provides. Precisely the same course would be pursued if the action were to be tried in the superior court of Alameda county. The suggestion that there "is no administration running its course" in the San Francisco court, where this action is pending, and that it is only the Alameda court "that can make application of the assets of the estate so as to pay in due course of administration," does not, in our opinion, complicate the case or strengthen appellant's position. The superior court as now constituted has jurisdiction, as we have seen, in all cases in equity (Code Civ. Proc., subd. 1, sec. 76), and, by the same section, it is given jurisdiction in civil actions of the class therein described (subdivision 2); in all cases at law as defined (subdivision 3); of still other actions mentioned and "of all matters of probate" (subdivision 4). In exercise of its jurisdiction "in cases in equity," such as the one here, and its jurisdiction in "matters of probate," such as administering the Warren estate, the proceedings of the superior court are as distinct and as dissociated as if there were two separate and different courts exercising these powers. So far, therefore, as the question of jurisdiction is concerned, the superior courts of the two counties stand on the same footing. The right to have the case transferred for trial to the Alameda court, if

such right exists, is not to be confounded with the right to bring the action in the city and county of San Francisco.

In his reply brief, appellant complains that respondent has not pointed out any way of escaping the supposed dilemma in which he may find himself should he secure judgment for some amount which, when secured, the court cannot enforce; that counsel should have explained "what would be the fate of the injunction in this case when such judgment would be made, inasmuch as the court's power to act in the case would terminate on making such judgment; and have explained what would or could have been accomplished by the issuing of an injunction restraining the disposition of the property." As these supposed difficulties are advanced in aid of the argument that the court had no power to make the order, we cannot overlook them, though unnoticed by respondent.

The action proceeds on the assumption that the estate of plaintiff's copartner, Warren, will be shown to be indebted to him, on a fair accounting, in a large sum of money; that the property of the estate returned by the administrator in his inventory is wholly insufficient to meet this claim; that certain of the defendants, among them the administrator himself, hold certain property, to wit, the alleged shares in the Warren corporation, which rightfully belongs to the estate and should be applied to discharge the debts of the estate, and should be turned over to the estate for the benefit of its creditors, plaintiff among others. The administrator is a party defendant in the action, and also in his individual capacity; so also are all the persons having any claim upon the subject of the action—the said corporation shares. The court may or may not find it necessary to appoint a receiver, but should such appointment be made, we can see no such dire result ensuing as appellant predicts—that, upon the court's allowing plaintiff's claim, "the whole scheme would collapse . . . , as the power of the court under section 1504 (Code Civ. Proc.) would thereupon be exhausted; and the receiver would be left stranded with the stock in his possession without having a court to protect him. . . . The court would be without power to make any disposition of the stock to satisfy the claim." Appellant's error is in assuming that the power of the court is limited by section 1504, Code of Civil Procedure. "When a court of equity has once obtained jurisdiction, it will do com-

plete justice by deciding the whole case." (*Watson v. Sutor*, 86 Cal. 500, 528, [24 Pac. 172, 25 Pac. 64]; Van Zile on Equity Pleading and Practice, sec. 11.) Just what course the court may pursue, in its disposition of the said corporation shares, after having found that they belong to the estate, need not be anticipated. It may order their sale and the proceeds to be paid to the administrator to be applied to the payment of creditors of the estate (*Emmons v. Barton*, 109 Cal. 662, 668, [42 Pac. 303]; *Shiels v. Nathan*, 12 Cal. App. 604, [108 Pac. 34]); or it may direct the defendant, administrator of the estate, to take possession of them as property of the estate and dispose of them for the benefit of the creditors of the estate. We fail to see how a receiver, if appointed, is in danger of being "stranded" or the court left with its hands tied, "without power to make any disposition of the stock to satisfy the claim" of plaintiff.

We pass to the proposition advanced by appellant, to wit: That plaintiff cannot maintain the action because he has not yet reduced his claim to judgment. It may be conceded at once that the general rule as to a creditor's bill is as claimed by appellant. But, like many other salutary rules, it has its exceptions, and, we think, the present case presents an example where other rules, firmly established by the courts, come into play and remove it from the operation of the general rule. Indeed, the action cannot strictly be called a creditor's bill; it is an action primarily for an accounting and incidentally to cause property belonging to a deceased partner to be subjected to administration for the benefit of creditors. The case here is that of an administrator who is administering the estate of a deceased partner of a copartnership; he has no power as such administrator to settle the affairs of the partnership; the surviving partners are charged with that duty (Code Civ. Proc., sec. 1585); averments in the complaint show the necessity for an accounting, a suit in equity (*Smith v. Smith*, 88 Cal. 572, [26 Pac. 356]); and it cannot be affected by an action at law; the third partner, Buckman, has assigned to plaintiff all his interest in any claim against their copartner's estate; it is alleged that there is valuable property belonging to the estate of the deceased partner which the administrator refuses to recognize as such or to include it in his inventory—property which by gift *causa mortis*, deceased caused to be

placed in the hands of certain of the defendants; the administrator is one of the transferees of this property, claiming an interest in it adversely to plaintiff and other creditors; in the very nature of the situation he cannot, as administrator, sue himself as such claimant, and assuredly would not, if he could, for he denies all claim of the estate to the property; he in common with his cotransferees, it is alleged, threatens to, and will, if not restrained, so dispose of this property as to prevent plaintiff and other of the creditors of the deceased partner from resorting to it for the payment of their claims; that the estate, shorn of this property, is wholly insufficient to meet the demands of creditors, and, finally, the defendants "are each and all of them financially irresponsible, except for said shares of the capital stock of said corporation, and the income and value thereof."

In *Case v. Beauregard*, 101 U. S. 690, [25 L. Ed. 1004], the court had the rule contended for by appellant under consideration. Said the court: "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly, the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, '*Bona, sed impossibilia non cogit lex.*'"

"Where the claim of complaint is purely equitable, and such as the chancellor will take cognizance of in the first instance, he will go the entire extent and inquire into obstructions in the road of enforcing the demand; and the complainant, therefore, when he goes into equity to assert and liquidate his claim, may, in addition to the assertion of his claim, ask relief against the fraudulent acts of the debtor in attempting to place his estate beyond the reach of creditors." (5 Ency. of Pl. & Pr., p. 463.) The rule "is not so strict as to deny to a party the interposition of the equity power of the court when the situation is such as to render impossible the aid of a court of law in taking the preliminary steps ordinarily treated as a condition precedent to the application for equitable relief." (20 Cyc., pp. 692, 701.)

The superior court, sitting in probate, cannot go into an accounting of the copartnership, nor determine the ownership

of the shares of the Warren corporation, for as yet they form no part of the estate and the administrator refuses to take the steps necessary to determine their ownership. The equity court alone can and will afford relief where the powers of the probate court are inadequate to do justice. (1 Woerner's American Law of Administration, 2d ed., p. *356.) Plaintiff should not be required to resort to a court at law where he could obtain no remedy. In *Emmons v. Barton*, 109 Cal. 662, [42 Pac. 303], it was held that "ordinarily an action to recover property fraudulently conveyed by a decedent in his lifetime should be brought by his executor or administrator, and such an action by a creditor will not lie, unless he shows that he has exhausted all means to procure such an action to be brought by the proper person; but where the alleged grantee is the executrix, a suit in equity will lie in favor of the creditor to set aside the fraudulent conveyance." (Syllabus.) Appellant distinguishes this case from the one here, because in the case cited the creditor had an allowed claim against the estate. But plaintiff did all he could to secure the allowance of his claim and it was rejected. The administrator here is one of the grantees of the property in question. We do not think, under the circumstances here appearing, that plaintiff was called upon to do more than he did to entitle him to bring the action, which is in fact the only adequate remedy available to him. It was held in the *Emmons* case, *supra*, that sections 1589 and 1590, Code of Civil Procedure, which provide for the commencement of actions by the administrator or executor, in cases such as this, do not furnish the only remedy. Said the court: "There may be cases in which the statutory proceedings would not afford an adequate remedy—'exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing.' (*Herrlich v. Kauffman*, 99 Cal. 271, [37 Am. St. Rep. 50, 33 Pac. 857].) In such case the code provisions may be departed from, for it is the province of equity to relieve where legal remedies fail. . . . A demand upon the appellant to bring the suit would have been fruitless."

The facts, in our opinion, warranted the issuing of the injunction. By no other means could the property have been preserved to await the result of the accounting. (Code Civ. Proc., sec. 526; Civ. Code, sec. 3422; 3 Pomeroy's Equity

Jurisprudence, 1st ed., sec. 1339.) Where an injunction is justifiable, the issuing of the writ is, in a large degree, a matter of discretion, "and should be exercised in favor of the party most likely to be injured." (*Paige v. Akins*, 112 Cal. 401, 412, [44 Pac. 666].)

The order is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 6, 1912.

[Civ. No. 954. First Appellate District.—April 8, 1912.]

OLSON-MAHONEY LUMBER CO., a Corporation, Appellant, v. WILLIAM MAXWELL et al., Defendants; McDONOUGH BROS., Respondents.

MECHANICS' LIENS—ABANDONMENT OF CONTRACT—PREMATURE PAYMENT BY OWNER TO CONTRACTOR.—Where a contract has been abandoned by the contractor, the owner is not entitled to any credit on account of a premature payment made by him to the contractor not earned, as against existing lien claimants, notwithstanding no notice to withhold was served upon the owner. The only deductions permissible from the ascertained value of the labor done and material furnished, where the contractor abandons the contract before completion, are for payments then due and actually paid, and none are permissible for sums then due and not actually paid, or for sums actually paid but not then due.

ID.—ERRONEOUS ORDER GRANTING NEW TRIAL TO OWNER OF BUILDING.—

It is held that the record upon appeal by a lien claimant from an order granting a new trial to the owner of the building does not show the existence of a single valid ground upon which such order, general in its terms, can be supported.

ID.—OBJECTION TO LEADING QUESTION TO WITNESS FOR PLAINTIFF—DIS-

CRETION NOT ABUSED.—Where the yard foreman of the plaintiff had testified fully as to the delivery of plaintiff's lumber at the place where the building was being erected, objection overruled to a leading question asked of the witness was not prejudicial, where the answer thereto would be merely cumulative of that already given.

Ordinarily, objections to leading questions should be sustained, but it is the established rule in this state that the allowance of such questions rests largely in the discretion of the trial court; and that a new trial will not be ordered merely because leading questions were permitted over objection, unless it plainly appears that the trial court abused its discretion. It is held that it was not here abused.

ID.—RULINGS UPON EVIDENCE NOT ERRONEOUS.—Rulings upon evidence are not erroneous where the witness under examination was unable to answer a question objected to, and there is confusion in the record as to whether another question was ever answered; but assuming that it was answered, since the question called for relevant, material and competent testimony, the objection thereto was properly overruled.

ID.—ABSENCE OF ERROR IN DENYING MOTION FOR NONSUIT.—It is held that there was no error in denying defendant's motion for a nonsuit, both for the reason that no grounds were stated for the motion, and that the plaintiff had introduced sufficient evidence to make a *prima facie* case.

ID.—SUPPORT OF FINDINGS AS TO PLAINTIFF'S LIEN.—There is no ground on which the evidence can be deemed insufficient to sustain the findings in favor of the plaintiff's lien as against a premature payment made by the builder to the contractor after the abandonment of the contract, under the provisions of section 1200 of the Code of Civil Procedure.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Henry A. Jacobs, James M. Oliver, and C. W. Lynch, for Appellant.

T. J. Crowley, for McDonough Bros., Respondents.

LENNON, P. J.—This action was instituted to foreclose a mechanic's lien for a balance due plaintiff for lumber delivered to the defendant, Union Construction Company, to be used, and which was actually used, in the construction of a certain building which was erected upon a lot of land in the city and county of San Francisco belonging to the defendant Henrietta Steinegger. The defendants, Peter B. McDonough and Thomas McDonough, were copartners, doing business

under the firm name of McDonough Bros. They were the lessees of the land, and the contract for the erection of the building was between them and the defendant, Union Construction Company. Judgment was rendered and entered foreclosing plaintiff's lien in the sum of \$1,418.61 upon the interest of the McDonough Bros. in the premises and building in question.

A personal judgment for the same amount was also entered in favor of the plaintiff and against the individual members of the defendant, the Union Construction Company. The defendant, Henrietta Steinegger, the owner of the land, posted a notice prior to the commencement of the work that she would not be responsible for the erection of the building, and as a consequence no judgment was rendered against her.

The trial court, upon motion of the defendants McDonough Bros., granted a new trial as to them. Alleged errors of law occurring during the trial, the insufficiency of the evidence to justify the decision, and that the decision was contrary to the evidence and the law, were the grounds urged for a new trial.

From the order granting a new trial, which was general in its terms, the plaintiff has appealed upon a record composed of the pleadings in the case which were used and referred to upon the hearing of the motion, and a bill of exceptions likewise used upon the hearing of the motion, which purports to contain the proceedings and the evidence had at the trial, and in addition sets out in full the findings of fact, the conclusions of law, and the judgment based thereon which was originally rendered and entered against the defendants McDonough Bros.

It is not disputed that the order granting a new trial must be sustained if it can be justified on any of the grounds which form the basis of the motion for a new trial; but appellant, in support of the appeal, claims that the record does not show the existence of a single valid ground upon which the order granting a new trial can be supported.

This contention, we think, must be sustained.

The first ground of defendants' motion for a new trial involves alleged errors of law occurring during the trial, and in support thereof numerous rulings of the trial court were assigned by the defendants as error in the statement used upon the hearing of the motion. Here, however, but three rulings of the court in the admission of evidence are relied upon by the defendants to justify the order granting a new trial. The

first relates to the testimony of the secretary and yard foreman of the plaintiff, who was called and sworn as a witness for the purpose of showing that the lumber ordered from the plaintiff had been delivered at the place where the building was being erected. One question, among many others, asked this witness was objected to upon the ground that it was leading and argumentative and called for incompetent evidence. The question undoubtedly suggested the answer desired, and the objection might have been properly sustained upon this ground alone. The question was not argumentative, but in addition to being leading it was ambiguous. The answer of the witness, however, was equally ambiguous, and had but slight, if any, tendency to establish the fact sought to be shown by the question. Moreover the witness had been previously fully examined upon the subject of the delivery of the lumber, and even if he had answered the question as counsel for the plaintiff desired, his testimony would have been merely cumulative of that already given. Ordinarily, objections to leading questions should be sustained; but it is the established rule in this state that the allowance of such questions rests largely in the discretion of the trial court, and that a new trial will not be ordered merely because leading questions were permitted over objection, unless it plainly appears that in so doing the trial court abused its discretion. In the present case we find no abuse of discretion in permitting the question complained of to be answered. The mere fact that the evidence sought to be elicited by the question was negative in its nature did not make it incompetent.

With reference to the two remaining assignments of error in the rulings of the trial court, it appears that the witness under examination was unable to answer one of the questions objected to, and as to the other question there is some confusion in the record as to whether or not it was ever answered; but assuming that it was answered, the question called for relevant, material and competent testimony, and the objection, therefore, was properly overruled.

The trial court did not err in denying defendants' motion for a nonsuit. No grounds were stated in support of the motion, and for that reason, if for no other, a nonsuit was properly denied. The claim of counsel for defendants that he was not given an opportunity to state the grounds of the motion

cannot be maintained in the face of the record, which shows that counsel "did not take the pains to trespass upon the court's time to state the grounds of the motion."

Aside from this, plaintiff had introduced sufficient evidence to make out at least a *prima facie* case; and it would therefore have been error to have granted a nonsuit.

Upon an examination of the entire record we do not find that the court, in its rulings upon the rejection or admission of evidence, or otherwise, erred to the prejudice of the defendants, and, therefore, the order granting a new trial cannot be justified upon the ground that the record shows errors of law occurring during the trial.

Passing from the alleged errors of law to a consideration of the second ground of the motion for a new trial, viz., that the findings are contrary to and not supported by the evidence, the record shows without conflict the following facts: The contract price was \$9,100, payable in four installments, the first, second and third each in the sum of \$2,200, and the final in the sum of \$2,500. The first installment, \$2,200, was paid strictly in accordance with the contract. The second installment, \$2,200, was not due when the contract was abandoned. In other words, at the time the contractor abandoned the contract the work had not progressed to the point at which, under the terms of the contract, the second installment was payable. Nevertheless the owner had from time to time made payments to the contractor in such sums that, when the contract was abandoned, the sum of \$2,200 had been prematurely paid to the contractor. This made a total of \$4,400 paid to the contractor before the abandonment of the contract, of which sum, as above indicated, \$2,200 was not yet due when the contract was abandoned. The work under the contract had not advanced to the point when the second installment of \$2,200 was payable. No notice under section 1184, Code of Civil Procedure, to withhold the second payment was ever served upon McDonough Bros. by the plaintiff, or by any other person who had supplied labor or materials to the original contractor.

The court found the value of the work done and materials furnished at the time of the abandonment of the contract by the contractor, including the materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, to be the sum of \$3,640.

The court also found that there had been paid to the original contractor pursuant to and under the terms of the contract the sum of \$2,200, and no more.

As a corollary of the two foregoing findings the court found that there remained in the hands of the respondents the sum of \$1,440 unpaid under the terms of the contract, and held the same to be applicable to the payment of appellant's lien.

In other words, the court refused to give to the owner any credit against the ascertained value (\$3,640) of the labor done and materials furnished up to the time of the abandonment of the contract, for the sum of \$2,200 confessedly prematurely paid and not yet due or earned at the time of the abandonment of the contract.

It is contended by the respondents that in so doing the court erred; that, as no notice had been served on the owner to withhold any payment, such owner upon the abandonment of the contract was entitled to credit for any payment in fact made, whether due or not, at the time of the abandonment.

It is upon this theory that respondents mainly rely to justify the action of the court in granting a new trial. The order granting the new trial cannot be sustained upon this theory.

When the contractor abandons the contract before completion of the work, the measure of the liability of the owner to laborers and materialmen is fixed by section 1200, Code of Civil Procedure, as it existed when this case was tried. (*Hoffman-Marks Co. v. Spires*, 154 Cal. 111, [97 Pac. 152]; *McDonald v. Hayes*, 132 Cal. 491, [64 Pac. 850]; *Golden State L. Co. v. Sahrbacher*, 105 Cal. 114, [38 Pac. 635].)

In accordance with this section the court found the value of the labor done and the materials furnished, including the materials actually delivered and on the ground, at the time of the abandonment of the contract, estimated as near as may be by the standard of the contract price, to be \$3,640. By the terms of the law there should be deducted from this sum "the payments then due and actually paid, according to the terms of the contract and the provisions of section one thousand one hundred and eighty-three and one thousand one hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens."

The only deductions that can be made are for payments then due and actually paid. The sum thus ascertained is

available for the payment of the liens of mechanics and materialmen, and is the only fund so available. (*Hoffman-Marks Co. v. Spires*, 154 Cal. 111, [97 Pac. 152].)

In the case at bar the only payment that had become due before the contract was abandoned was the first payment of \$2,200, and for this the court gave the owner due credit. Although the amount of the second installment had been paid to the contractor before the abandonment of the contract, it had not become due, and never did become due to the contractor, according to the terms of the contract, or at all. The work not having been performed by the contractor up to the point when the second installment was payable, no part of it ever did become due under the contract.

In the case of an abandonment of the contract the law fixes as the basis of the liability of the owner to workmen and materialmen the value of the labor done and materials furnished estimated according to the standard of the contract price, and from this there can be deducted only such sums as are "then due and actually paid." No deduction can be made for sums then due and not actually paid, and no deduction can be made for sums actually paid but not then due.

We have been cited to the case of *Sweeney v. Meyer*, 124 Cal. 512, [57 Pac. 479], and the concurring opinion of Justice Shaw in *Valley Lumber Co. v. Struck*, 146 Cal. 272, [80 Pac. 405], as to the effect of want of notice to the owner to withhold payments. We do not think that either case controls the decision of the case at bar. In neither of the cases above mentioned was the court dealing with the case of an abandoned contract. Such a case is, as we have shown, governed by the provisions of section 1200, Code of Civil Procedure. (*Hoffman-Marks Co. v. Spires*, 154 Cal. 111, [97 Pac. 152].) Whatever was said in the opinion of Mr. Justice Shaw in *Valley Lumber Co. v. Struck*, 146 Cal. 272, [80 Pac. 405], as to the effect of failure to give notice to withhold a progress payment made before it becomes due, has no reference to a payment which, although made never did become due because of abandonment of the contract. Under the law as we understand it, if an owner chooses to make payments to the contractor before they become due, he takes the risk either that he may be served with timely notice to withhold such payments, or that the contractor may abandon the contract before such payments be-

come due—in either of which cases it is clear that the owner can have no credit for such premature payments as against lien claimants.

Inasmuch as the second payment of \$2,200 had not become due before the contract was abandoned, the court correctly found that \$2,200, and no more, had been paid under the terms of the contract, and that there remained unpaid in the hands of the owner the sum of \$1,440.

The order of the court granting a new trial cannot, therefore, be supported upon the insufficiency of the evidence to support the findings attacked. No other finding was proper under the conceded facts and the law as we believe it to be.

This disposes of all the points relied on, as we understand the record, in support of the order granting the new trial. The order is reversed.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 960. First Appellate District.—April 16, 1912.]

W. H. CONE, Appellant, v. SERENA T. KEIL and HUGO D. KEIL, Respondents.

ACTION FOR BROKER'S COMMISSIONS—AUTHORITY TO SELL TWO TRACTS—INTERESTING PERSON WHO BUYS ONE TRACT FROM OTHER AGENTS—NONSUIT.—Where the written authority of a broker, whose assignee is suing for his commissions on the sale of one of two tracts of land, was for the joint sale of the two tracts, at a fixed price, upon a commission of five per cent, and through the broker's efforts a person became interested in the smaller parcel, but he was not introduced to the owner, and the sale thereof was effected through other agents, the plaintiff was properly nonsuited, because, first, the evidence shows no sale under the written authority, and because, second, the sale on which the commission is claimed was not effected by the broker as the proximate cause thereof.

ID.—ESSENTIALS OF RECOVERY OF BROKER'S COMMISSIONS.—A broker is entitled to his commissions for effecting a sale of property only when it affirmatively appears that the purchaser, as the result of the broker's efforts, was induced to buy the property, or that a prospective purchaser was ready, able and willing to buy upon the terms and at the price specified by the owner. The obligation of

the broker under his contract with the purchaser is to bring about a meeting of minds between the owner and a prospective purchaser for a sale of the property at the price and upon the terms at which the property is offered for sale, and which could be enforced by the owner, if he has a perfect title. Or if there is no contract, it must appear that the broker brought the owner and prospective purchaser together, with the view to effect and secure a contract of sale upon the owner's terms.

ID.—PUTTING PROSPECTIVE PURCHASER UPON TRACK OF PROPERTY ON MARKET.—Merely putting a prospective purchaser on the track of property which is on the market will not entitle the broker to the agreed commission, nor will he be entitled thereto if he finally fails in his efforts, without the fault or interference of the owner, to induce the prospective purchaser to buy, or make an offer to buy, although the owner may subsequently, either personally or through other brokers, sell the same property to the same individual at the price and terms for which the property was originally offered for sale.

ID.—PLEADING—CAUSE OF ACTION LIMITED TO INDIVISIBLE CONTRACT OF SALE—ABSENCE OF PROOF—PROPER NONSUIT.—Where the complaint states only a cause of action on the written contract authorizing the broker to sell both tracts together, and does not allege any modification of the same, or any other employment of the broker by the owner of the property, it shows an indivisible contract of sale for the entire property, which required the broker to procure a purchaser for the entire tract before he could be entitled to any commissions; and there being an entire absence of proof as to the performance of the contract alleged, for this reason, if for no other, a nonsuit was properly granted.

ID.—EVIDENCE OUTSIDE ISSUES.—Where the assigned claim sued upon by the plaintiff was for commissions on the sale of one tract only, evidence of a subsequent purchase of part of the other tract is outside the issues, and is inadmissible.

ID.—ADMISSION OF LETTER NOT MADE PART OF RECORD—ERROR NOT APPEARING.—Error, to be a ground of review, must affirmatively appear; and where a letter was admitted in evidence which is no part of the record, it must be presumed that the ruling of the trial court in relation thereto was correct.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

William H. Cobb, for Appellant.

Goodfellow, Eells & Orrick, for Respondents.

LENNON, P. J.—This action was instituted to recover the sum of \$1,375, alleged to be due as a broker's commission in negotiating a sale of certain real estate which belonged to the defendants. Plaintiff has appealed from a judgment of nonsuit and an order denying a new trial. The case was tried by the court without a jury, and the record before us consists of the judgment-roll and a bill of exceptions, which purports to set out the evidence had in the lower court.

In substance, the undisputed facts of the case, as they appear from the evidence offered upon behalf of the plaintiff, are these: On November 15, 1907, the defendants, by an instrument in writing, authorized one Edgar C. Humphrey, plaintiff's assignor, to offer for sale a tract of land in Menlo Park, San Mateo county, containing thirteen and ninety-eight hundredths acres, and known as "Petit Forest." This tract of land consisted of two smaller parcels, designated in the authority sued upon as subdivision A containing six and twenty-five hundredths acres, and subdivision B containing seven and seventy-three hundredths acres. By the terms of the authorization Humphrey was empowered to offer the entire tract for sale for the sum of \$45,000 cash, or for such other price and upon such other terms as the defendants might thereafter agree to in writing. Humphrey's compensation in the event of his procuring a purchaser was to be a commission of five per cent upon the amount of the purchase price. Exclusive authority to offer the property for sale was not conferred upon Humphrey, and the defendants never agreed, in writing or otherwise, upon any different price or terms at which the property might be offered for sale.

In October, 1908, almost a year after the authorization was given, Mr. Albert G. C. Hahn went to Menlo Park for the purpose of looking at places which were for rent. Humphrey met him at the station, and took him at once to the defendants' property, and offered the entire tract for sale for the sum of \$50,000. Hahn declined to entertain the offer for the reason, as he said, that he "was seeking to rent a house, not to purchase one." Later on, in the spring of 1909, Humphrey endeavored to and did interest Hahn in the tract comprising seven and seventy-three hundredths acres, designated in the authorization as subdivision B, and offered it for sale for the sum of \$35,000. Hahn liked this particular piece of prop-

erty and felt inclined to buy it, but not at the price fixed by Humphrey. After looking at the property several times in company with Humphrey, Hahn concluded that the price asked was prohibitive and so told Humphrey. Thereupon Hahn dropped the matter and had no further dealings with Humphrey; but shortly thereafter an agent of the real estate firm of Baldwin & Howell approached Hahn, and offered him the identical tract of seven and seventy-three hundredths acres for the sum of \$30,000. This offer was considered by Hahn, and the property was sold to him for \$27,500, but before the negotiations for the sale were commenced, Hahn met Humphrey and told him of the offer made by Baldwin & Howell, whereupon Humphrey requested that Hahn purchase the property at the price of \$30,000 through him. Hahn declined to have any further dealings in the matter through Humphrey; and told him that inasmuch as the firm of Baldwin & Howell had offered the property for sale for \$5,000 less, the purchase would be made through them. In reply Humphrey said: "I have nothing further to say. All that I can do is to submit the bid that you offer. If you wish to make an offer for the property I will be glad to submit it for you." This ended all negotiations for the sale of the property between Hahn and Humphrey. Hahn subsequently made an offer in writing, through Baldwin & Howell, for the purchase of the property, which was accompanied by a deposit of \$275.

It is conceded that Hahn became interested in the property in the first instance solely through the efforts of Humphrey, and that when the other brokers appeared in the transaction, Hahn, as the result of Humphrey's efforts, was fully informed concerning the property. Either on the day or the day after Hahn had made an offer for the property through Baldwin & Howell, Humphrey informed the defendants that he had been endeavoring to induce Hahn to buy the property. Hahn and the defendants, however, were never introduced, and Hahn did not meet or communicate directly or indirectly with either of the defendants prior to the time that the offer to purchase was made through Baldwin & Howell. It is an admitted fact in the case that Hahn never made through Humphrey, in writing or otherwise, an offer to purchase the property in question either as a whole or in part, and Hahn's testimony that

he flatly refused to make an offer for the property through Humphrey stands uncontradicted.

Excepting minor details, the foregoing statement constitutes a fair *résumé* of the facts of the transaction upon which plaintiff relies for a recovery of the commission sued for.

The defendants' motion for a nonsuit was based upon the grounds (1) that the evidence failed to show that Humphrey ever procured a purchaser for the entire tract for the sum of \$45,000, and (2) that the evidence shows that Humphrey was not the proximate and efficient cause of procuring and securing Hahn as a purchaser of the smaller tract of land.

We are of the opinion that the motion for a nonsuit was properly granted upon both of the grounds stated.

A broker is entitled to his commission for effecting a sale of real or personal property only when it affirmatively appears that the purchaser, as the result of the broker's efforts, was induced to buy the property, or that a prospective purchaser was ready, able and willing to buy upon the terms and at the price specified by the owner. In other words, the obligation of the broker under his contract to procure a purchaser is to bring about a meeting of minds between the owner and a prospective purchaser for a sale of the property at the price and upon the terms at which the property is offered for sale. Before the broker's right to a commission can accrue he must first show that he found and secured a purchaser ready, willing and able to buy the property offered for sale upon the terms and at the price fixed by the owner. Such a showing can be made only by proof of the fact that the broker procured from the prospective purchaser a valid contract, binding him to purchase the property at the price and upon the terms specified, which could be enforced by the owner if his title to the property be perfect, or, in the absence of such a contract, by proof that the broker brought the owner and prospective purchaser together with the object in view of effecting and securing a contract of sale at the price and upon the terms proposed by the owner. (*Gunn v. Bank of California*, 99 Cal. 349, [33 Pac. 1105]; *Mattingly v. Pennie*, 105 Cal. 514, [45 Am. St. Rep. 87, 39 Pac. 200]; *Brown v. Mason*, 155 Cal. 155, [99 Pac. 867].)

Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the

broker to the commission contracted for, and even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale. (*Markus v. Kenneally*, 19 Misc. Rep. 517, [43 N. Y. Supp. 1056]; *Willard v. Ferguson*, 125 App. Div. 868, [110 N. Y. Supp. 909].)

Although in the present case Humphrey was the first person to arouse Hahn's interest in the property, nevertheless he failed ultimately in his efforts to induce Hahn to buy or offer to buy, and, therefore, it cannot be said that Humphrey's efforts were the procuring cause of the sale subsequently made to Hahn.

As was said in *Sibbald v. Iron Co.*, 83 N. Y. 378, [38 Am. Rep. 441]: "A broker may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest. But all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligations, others might be left to some extent to avail themselves of the fruits of his labors."

At no time did Humphrey obtain from Hahn a valid or any contract to purchase the property in question. Humphrey did not succeed even in procuring an offer for the property from Hahn, and at no time did Humphrey bring or attempt to bring the owners and Hahn together so that the owners, if they had desired, might have negotiated a sale. Moreover, Hahn testified positively and without contradiction that prior to making an offer for the property through Baldwin & Howell, he had absolutely refused to deal with Humphrey or make an offer through him. In short, it is a fair inference from the evidence offered in support of plaintiff's case that in all probability the sale never would have been made without the intervention and subsequent efforts of Baldwin & Howell.

Aside from these considerations the plaintiff's complaint sets out the written contract of the defendants authorizing a sale of the entire tract, and alleges that in accordance with the terms thereof, and while the same was in full force and effect, Humphrey procured Hahn as a purchaser for subdivision B, containing seven and seventy-three hundredths acres of the property described in said contract. Plaintiff's complaint does not allege and his evidence does not show any other employment of Humphrey with relation to a sale of defendants' property. No other agreement is pleaded, and there is no evidence of any agreement to compensate Humphrey for any service which he might render to the defendants other than that contained in the original written authorization, by which he was employed and authorized to sell the defendants' property as a whole. Not having been otherwise specially authorized, Humphrey's agency was limited to the particular purpose of his original employment, and his compensation depended upon his accomplishment of that purpose in accordance with the terms of his contract. It was not pleaded by the plaintiff that the original authorization was ever modified, either expressly or by implication, and, therefore, it is apparent that the plaintiff's cause of action, if any he has, must rest upon proof of compliance with the terms of his actual contract. That, as we read and understand it, required Humphrey to procure a purchaser for the entire tract before he would be entitled to the stipulated commission. Clearly, the contract in question did not authorize Humphrey to offer for sale separately either subdivision of the entire tract, nor contemplate that the defendants could be required to pay a commission for the procurement of a purchaser for anything less than the entire tract.

This being so, the contract was indivisible; and before the plaintiff will be permitted to recover thereon, he must plead and prove the performance of the entire contract. For this reason, if for no other, a nonsuit was properly granted. (*Wittie v. Taylor*, 110 Cal. 225, [42 Pac. 807]; *Carpenter v. Atlas Imp. Co.*, 123 App. Div. 706, [108 N. Y. Supp. 547]; 3 Devlin on Real Estate, sec. 1536.)

In support of the appeal from the order denying a new trial plaintiff assigns as error two of the trial court's rulings upon

questions of evidence, but we do not think the record shows that the trial court erred in either instance.

The first ruling complained of arose out of the cross-examination of Hahn, the purchaser and a witness for the plaintiff, who testified that he had purchased from the defendants subsequently to the sale of the seven and seventy-three hundredths acre tract another piece or parcel of the larger tract of land which Humphrey was originally authorized to sell. Upon re-direct examination counsel for plaintiff endeavored to show how much more of the entire tract Hahn had purchased in addition to the seven and seventy-three hundredths acre tract. This was objected to by counsel for the defendant upon the ground that it was immaterial and not within the issues raised by the pleadings in the case.

The objection, we think, was well taken and rightfully sustained. If the plaintiff had pleaded a full performance of Humphrey's contract with the defendants, and had relied upon a sale of the entire tract for a recovery of the commission claimed to be due, it would have been material and relevant for the plaintiff to show, if he could, that as the result of his efforts Hahn had bought not only subdivision B, but all of subdivision A as well. Plaintiff's cause of action, however, was founded exclusively upon the theory that Humphrey was the sole procuring cause of the sale to Hahn of the seven and seventy-three hundredths acre tract, and it was not alleged in plaintiff's complaint nor claimed at the trial that Humphrey was instrumental in making a subsequent sale to Hahn of any other lands belonging to defendants. In brief, the plaintiff's cause of action was based solely upon an assigned claim for the commission alleged to be due and owing to Humphrey for the sale of subdivision B, and, therefore, it was not material to know under the issues raised by the pleadings whether or not Hahn had subsequently purchased from defendants another portion of the entire tract. The fact that upon cross-examination Hahn had testified without objection to an immaterial matter did not entitle the plaintiff, in the face of defendants' objection, to examine further into the details of a transaction which was wholly foreign to the issues.

With reference to the second assignment of error it will suffice to say that it does not appear from the record before

us that the trial court erred in sustaining an objection to a question put to the defendant Hugo D. Keil, whereby the plaintiff attempted to show that Keil represented his wife in the sale of property which was referred to in a certain letter written by him. It does not appear to whom the letter was written nor to what property it referred; and as the letter was not made part of the record upon appeal, we are unable to determine whether or not the court erred in its ruling. Error must be affirmatively shown, and in the absence of such a showing the presumption prevails that the ruling of the trial court was correct. (*Marshall v. Hancock*, 80 Cal. 82, [22 Pac. 61]; *Barrell v. Lake View Land Co.*, 122 Cal. 129, [54 Pac. 594].)

The judgment and order appealed from are affirmed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 927. Third Appellate District.—April 16, 1912.]

**DUDLEY KINSELL, Appellant, v. RICHARD THOMAS
and MARY ISABEL THOMAS, Respondents.**

ACTION BY GRANTEE OF HUSBAND TO QUIET TITLE TO LOT ON HOMESTEAD—PAROL GIFT—IMPROVEMENTS—EQUITABLE DEFENSE AND CROSS-COMPLAINT—RELIEF.—An action by a grantee of the surviving husband to quiet title to a town lot, forming part of homestead property, which appears to have been given by parol gift of both husband and wife to their son, who had previously rendered services for their benefit, which lot was, at that time, of the value of only \$75, under an agreement that he was to fence and improve the same, which he did to the extent of \$1,500, is not tenable in equity; but the son may plead such equitable facts by way of answer and cross-complaint, and the court may quiet his title thereto, and adjudge a conveyance of the legal title, either by the plaintiff, or otherwise, by a commissioner's deed.

ID.—RIGHTS OF SPOUSES IN HOMESTEAD—JOINT, LEGAL OR EQUITABLE ACTION ESSENTIAL—SUPPORT OF FINDINGS AND JUDGMENT ENFORCING EQUITY—CONFLICT.—Neither of the spouses can, in law, grant any rights in the homestead property without the consent of the other; and neither of them can create an equity therein by parol gift, without the consent of the other. Yet, where it appears that

an executed parol gift of a lot thereon was made by the joint act of both husband and wife to their son, for a consideration previously received from him, and also his fencing and improving the same for a home, which he did at great expense to himself, equity will protect such executed parol gift; and findings and a judgment enforcing them will not be disturbed, notwithstanding a conflict of evidence, where there is sufficient evidence to support the findings.

ID.—NOTICE OF DEFENDANT'S EQUITY TO PLAINTIFF—WANT OF PURCHASE IN GOOD FAITH—CONSIDERATION OF DEED—PRESUMPTIONS.—Where the defendants, husband and wife, were in undisputed possession of the lot in controversy when the plaintiff obtained a deed thereof from the father, such possession of an improved and fenced lot was sufficient to put the grantee upon inquiry as to their rights in the premises, and to charge him with notice thereof. And where there is no evidence to rebut the presumption that the recital of \$10 in the deed was the sum actually paid by the plaintiff to the father for the son's lot and improvements, it must be presumed that that was all that he paid therefor; and it must also be presumed that he took such conveyance with full notice of the legal and equitable rights of the son, and in subordination thereto.

ID.—EQUITABLE RIGHTS OF SON TO IMPROVEMENTS—CONDITION OF EQUITABLE RELIEF.—Whatever may be said of the legal rights of the son, and even if it should be supposed that one of the spouses failed to consent to the gift, yet inquiry would have shown either that he possessed a valid title thereto, or that he was made to believe, and therefore honestly believed, that he owned such title, and under such belief made expensive improvements, which, under the circumstances, vested in him an equity in the premises, of which he could not wantonly be divested or deprived without reimbursement or compensation, as a condition precedent to the right of the plaintiff to the equitable relief sought by him. He cannot have equitable relief without doing equity.

ID.—PAROL GIFT OF HOMESTEAD—ENFORCEMENT IN EQUITY.—A parol gift of real property by the husband and wife, for whose benefit a homestead has been declared on the property, and is in existence at the time of such gift, may and will be enforced by a court of equity when the circumstances of such gift are similar to those under which a like gift of real property not impressed with a homestead will be enforced.

ID.—GROUND OF EQUITABLE RELIEF—STATUTE OF FRAUDS—ESTOPPEL FROM STANDING ON LEGAL RIGHTS—PREVENTION OF FRAUD.—Equity does not grant relief respecting parol gifts of land on the ground that the agreement for a writing under the statute of frauds should be dispensed with. It regards the writing as of binding force in law, but acting *in personam*, and operating upon the consciences of the parties to such agreements, equity merely says that a party

to such parol gift will be estopped from standing on his legal rights in support of his refusal to carry out the parol agreement, where the circumstances disclose that such conduct on his part would be unconscientious and work a fraud upon the rights of the other party.

APPEAL from a judgment of the Superior Court of San Mateo County. Geo. H. Buck, Judge.

The facts are stated in the opinion of the court.

Vance McClymonds, and Mastick & Partridge, for Appellants.

Ross & Ross, for Respondents.

HART, J.—This action was brought for the purpose of quieting plaintiff's title to a certain piece or parcel of land situated in the town of Spanishtown, in the county of San Mateo.

The complaint alleges that the plaintiff is the owner in fee of the real property described in the complaint, and that the defendants claim some estate or interest in said property, which claim "is without right or merit, and said defendants have not, nor has either of them, any right, title or interest in or to said property, or in or to any part thereof."

The answer alleges that the property described in the complaint was a portion of a twenty acre tract of land which, for many years prior to the year of 1904, belonged to the parents of the defendant, Richard Thomas, the legal title to said land standing in the name of his father, Joseph S. Thomas; that "for more than four years prior to the year 1904 the defendant Richard resided on said parcel of land with his said parents, and during the last four years of his so residing thereon with his said parents, being then of the age of twenty-one years and upward, rendered and performed labor and services for his said parents in the care and cultivation of said parcel of land." The answer further avers that the parents of Richard, desiring to compensate the latter for the services so performed by him, proposed to him that they would give him the piece of land described in the complaint, and "that he might and should erect and place improvements on said last-named parcel of land and thereby

increase the value thereof, and have a home for himself thereon, and requested the defendant Richard to take possession thereof and fence the same and place a house and barn and other buildings thereon, and improve said parcel of land." It is further averred that Richard accepted the proposition thus made to him, and that, with the knowledge and consent and active assistance of his parents, he purchased a dwelling-house, which was located on the opposite side of the road from the land in question, moved said house to and on said land, made additions thereto, inclosed said land with a fence, erected a stable thereon, "and filled in said lot with soil and gravel, and very largely increased the value of said parcel of land"; that at the time said land was so given to the defendant Richard the same did not exceed in value the sum of \$75, but that, by reason of the improvements made thereon by said Richard, as described, and of additional improvements made thereon by him (such as filling it in, sinking a well and the planting of trees and shrubbery thereon), said land increased in value from the said sum of \$75 to the sum of \$1,500 or more; that after the gift of said land under the circumstances thus disclosed, the defendant Richard, for a period of more than one year, performed for his parents further and other labor and services, for which he received no compensation otherwise than through the gift of said land.

In the month of June, 1909, so the answer proceeds, the mother of Richard died, and thereafter, for a long period of time, the father of Richard went to the home of the latter and there resided and was cared for and supported by said Richard without compensation therefor. The answer charges that, on the twenty-eighth day of June, 1909, the said father of the defendant Richard (Joseph S. Thomas) conveyed the land in controversy to plaintiff, and that the last named "took and accepted said conveyance with full knowledge of all the facts hereinbefore mentioned, and then and there knew that the said defendants were in the actual possession of, and residing upon, and occupying, said land, claiming to own the same under and by reason of said gift thereof by the parents of said defendant Richard to him, said Richard."

Upon the special defense thus pleaded the defendant asks for affirmative relief, praying for a judgment and decree of

the court "that plaintiff take nothing in said action; that the title of the defendants to said parcel of land be quieted as against the plaintiff in said action; that the plaintiff be enjoined and restrained from asserting any right, title or interest therein adverse to the defendants, or either of them," etc.

The defendant Richard also filed a cross-complaint, the averments of which are substantially the same as those of the answer, but, in addition to the relief prayed for in the answer, he asks for a judgment "decreeing that said plaintiff holds the legal title to said parcel of land in trust for said defendant and cross-complainant; that said plaintiff be ordered and decreed to make, execute and deliver to said cross-complainant a good and sufficient conveyance of all of said parcel of land; that in the event said plaintiff shall fail or neglect to so execute a good and sufficient conveyance thereof, that a commissioner be appointed by this court to make, execute and deliver to cross-complainant a deed thereof."

The court found the facts as alleged in the answer and the cross-complaint to be true, and rendered judgment accordingly, and therein named the clerk of said court as a commissioner for the purpose of executing a deed conveying a legal title to the disputed land to the defendant, Richard Thomas, in case the plaintiff failed to so execute a conveyance of said land.

This appeal is brought here by the plaintiff from said judgment on a bill of exceptions.

The plaintiff claims title to the property described in his complaint by virtue of the deed executed by Joseph S. Thomas, the father of the defendant Richard, on the twenty-eighth day of June, 1909, conveying said property to said plaintiff.

There was a homestead on all the land of which the parcel in dispute was a part, but the deed from Joseph S. Thomas to the plaintiff was executed after the death of the wife of the grantor.

The sole question presented here is whether the evidence supports the vital findings. The principal contention in this regard is founded upon the proposition that, it appearing that the land of which the property in controversy was a part was, at the time of the alleged gift, impressed with a homestead, executed and filed for record by both the parents of Richard,

on the thirteenth day of May, 1879, the evidence neither shows that the defendant's mother joined his father in the alleged gift nor that the latter, after the death of Richard's mother, made the gift, and that, therefore, the purported transfer is absolutely void.

It will, of course, not be disputed as a well-settled legal proposition in this state that "neither spouse can alienate or encumber the homestead without the joint act of the other, and that the effort so to do is a nullity, and will not be validated by a subsequent dissolution of the marriage or termination of the homestead." (*Lange v. Geiser*, 138 Cal. 682, [72 Pac. 343]; *Gleason v. Spray*, 81 Cal. 217, [15 Am. St. Rep. 47, 22 Pac. 551]; *Powell v. Patison*, 100 Cal. 238, [34 Pac. 677]; *Hart v. Church*, 126 Cal. 471, [77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296]; *Friermuth v. Steigleman*, 130 Cal. 392, [80 Am. St. Rep. 138, 62 Pac. 615]; *Payne v. Cummings*, 146 Cal. 431, [106 Am. St. Rep. 437, 80 Pac. 620].)

Nor will the proposition be questioned that a parol gift of real property, under certain circumstances or conditions, will be sustained by courts of equity. In *Bakersfield v. Chester*, 55 Cal. 102, our supreme court concisely states the rule as follows: "A gift of real estate may be made by parol if possession is given and taken under such gift and acts done by the donee to carry out the purpose of the gift."

In *Anson v. Townsend*, 73 Cal. 417, [15 Pac. 49], the court says that "it is, of course, settled law that courts will compel the specific performance of parol contracts for the sale of real property where there has been a part performance of the contract, and parol gifts will be enforced under like circumstances and conditions as parol sales."

In *Neale v. Neale*, 9 Wall. 1, [19 L. Ed. 590], the court says: "Equity protects a parol gift of land equally with a parol agreement to sell it if accompanied by possession and the donee, induced by a promise to give it, has made valuable improvements on the property, and this is particularly true where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift." (See, also *Freeman v. Freeman*, 43 N. Y. 34, [3 Am. Rep. 657]; *Burlingame v. Rowland*, 77 Cal. 315, [1 L. R. A. 829, 19 Pac. 526]; *Riggles v. Erney*, 154 U. S. 244, [38 L. Ed. 976, 14 Sup. Ct. Rep. 1083]; *Townsend v. Vander-*

werker, 160 U. S. 171, [40 L. Ed. 383, 16 Sup. Ct. Rep. 258]; *Calanchini v. Branstetter*, 84 Cal. 253, [24 Pac. 149].)

It is manifestly true that if the evidence in the case at bar does not show that the parents of Richard joined in the gift of the land in dispute to him, then the position of appellant is correct, since the attempted transfer of property upon which there subsists a homestead, selected by the head of the family, by one of the spouses only would be absolutely void.

If, on the other hand, the evidence sustains the findings upon which the decree is planted, viz., that the transfer was by the joint act of the parents, then, obviously, the judgment cannot be disturbed. The only question, then, is whether the evidence supports those findings. We are of the opinion that it does, as we think must be made plainly to appear by an examination of the facts as proved.

The defendant, Richard Thomas, in substance, testified that, from the time he was sixteen years of age up to the time he was given the land in question, and for several years after he had reached his majority, he worked and performed services for his father; that he had a number of conversations with his father and mother in reference to compensation for such services; that they often said to him, "why didn't I build a house to live in"; that, while he was living on the "Cardoza place," where he was farming seven acres of ground, his father asked him "why did I rent a place like that for? I should be home. I said, 'No, I want to be by myself. I have a horse of my own.' He said, 'You need not do that; I will give you that corner,' " referring to the land in question; that he (the father) "would give it to any one of the boys that would build there, because he wanted to have some of the boys alongside of him. *My father and mother told me to go ahead and do it.*" After some hesitation, Richard accepted the gift of the land thus proffered by his father and mother, and thereupon bought from a neighbor a house situated near the land, and moved the same to said land. The house was bought by Richard in the presence of his father, and the latter rendered him some assistance in moving it to the land in controversy. Richard thereafter put some improvements on the house, enlarging it by building an addition thereto, erected a barn on the premises, sunk a well and planted trees and shrubbery thereon, and otherwise and gen-

erally so improved the place as to bring its value up to a sum exceeding \$1,500, or to a sum in excess of \$1,400 more than the testimony shows the land to have been valued at when the same was given to him. The witness said that he had had many conversations with his mother concerning the land, both before and after he put the house up. On one occasion he remarked to her that, having had some angry discussion with his father, "I am kind of afraid there will be some trouble about that lot some day," to which she replied: "Don't you fear; that lot is going to be yours as long as you live, and there is no law that is going to take it away from you." The witness, in this connection, declared that "she told me that she had given me the lot." Richard further testified that, after his mother's death, his father came to his home and lived with him; that on one occasion, after his mother's death, his father said to him that the lot was his (Richard's), and that he could "do with it as you have a mind to."

One Antone Davis, an old resident of Halfmoon Bay, in the vicinity of which place the land concerned here is situated, testified that both the father and mother of Richard declared to him that they had given the disputed land to Richard.

There was produced in behalf of Richard other testimony, a detailed review of which in this opinion is unnecessary, tending to sustain his claim that the property had been transferred to him by gift by his parents.

The only oral testimony offered by the plaintiff, in contradiction to Richard's testimony, was that given by his father, Joseph S. Thomas, who testified that, "about a month or two" after the death of his wife, he had a conversation with Richard in which he proposed that the latter buy the land described in the complaint and that Richard replied that he would buy it. This testimony was rebutted by Richard, who testified that no such conversation as that to which his father testified ever occurred.

As before stated, in our opinion the evidence, of which the foregoing statement contains a fair conspectus, sufficiently sustains the decision of the trial court.

The testimony clearly enough shows that the parents joined in the gift of the property to Richard in consideration of

services theretofore rendered by the donee for them and of an agreement on the latter's part that he would build a house on the premises and otherwise improve them, and that Richard performed his part of the convention. The only contradiction to Richard's testimony as to the gift is found in the testimony of his father, who, as we have shown, referred to a conversation occurring after the death of the latter's wife, with Richard, wherein he (Joseph) proposed that Richard buy the property and that the latter agreed to that proposition. It will be noted in this connection that Joseph does not directly say that he and his wife did not give the land to Richard under the circumstances as detailed by the latter. His testimony, at the most, may be regarded as merely furnishing a rather remote foundation for the inference that the property had not previously been transferred to Richard. But, in any event, the evidentiary significance of this testimony was a matter for the trial court to determine, and its conclusion thereon, as evidenced by its findings, is binding upon us.

It is not disputed that Richard took possession of the property at the time it was given to him, made extensive and, compared to its value, expensive improvements thereon, and continuously maintained possession and had possession at the time of the pretended conveyance of the land to plaintiff, and, indeed, up to the time of the trial of this action. It further stands as an undisputed fact that the improvements added to the property by Richard and which increased the value thereof from \$75 to a sum exceeding \$1,500, were made at his own expense or by the expenditure of his own labor and money. The father of Richard was to some extent supported and maintained by Richard at his home after his mother's death without compensation, other than that received through the gift of this land. All these circumstances seem to tend, and no doubt the trial court so viewed them, to corroborate the claim of Richard that the property was jointly given to him by his parents. But, as to the contention that the gift was not jointly made by the parents, we need only to refer to the testimony of Richard wherein he declared that both his father and mother agreed and proposed that the property should be given him and that, when he accepted the gift and took possession, both acquiesced in it, and always thereafter and until the death of his mother and the execution and delivery of the

deed to plaintiff by his father treated Richard as the owner of the property. Even after the death of Richard's mother, his father assured him that the property belonged to him (Richard), and thus recognized as valid the joint transfer thereof to Richard by himself and his wife.

But we perceive no necessity for further pursuing a discussion of the facts. It is sufficient to repeat that, upon the whole record, we are persuaded that the trial court was justified in reaching the conclusion, as crystallized in its judgment, that the gift was by the joint act of Joseph S. Thomas and his wife.

Moreover, it may be observed that all the equities appear to be with Richard Thomas and against the plaintiff. The consideration for the conveyance to plaintiff and all the circumstances clearly indicate that the plaintiff was not a purchaser in good faith.

There is no evidence in the record rebutting the presumption that the amount recited in the deed as the consideration for the conveyance to plaintiff, viz., the sum of \$10, was the sum actually paid by plaintiff to Joseph S. Thomas for the land and its improvements (13 Cyc. 613; Devlin on Deeds, sec. 817), and it must, therefore, be assumed that that sum was the amount so paid for the land. Furthermore, Richard Thomas having been in open, notorious and exclusive possession of the land at the time of the alleged purchase of the same from and conveyance thereof by Joseph S. Thomas, the plaintiff was, therefore, put upon inquiry as to the legal or equitable rights, or both, of Richard Thomas, and is presumed to have purchased the land and taken a conveyance thereof from the vendor with full notice of all the legal and equitable rights in the premises of said Richard and in subordination to those rights. (*Pell v. McElroy*, 36 Cal. 271; *Scheerer v. Cuddy*, 85 Cal. 273, [24 Pac. 713]; *Security etc. Co. v. Willamette etc. Co.*, 99 Cal. 636, [34 Pac. 324]; *Stonsifer v. Kilbourn*, 122 Cal. 659, [55 Pac. 587]; *Robinson v. Muir*, 151 Cal. 123, [90 Pac. 521]; *Niles v. Cooper*, 98 Miss. 39, [13 L. R. A., N. S., 49, 107 N. W. 744]; *Lowther Co. v. Miller*, 53 W. Va. 501, [97 Am. St. Rep. 1039, 44 S. E. 433].)

As the court says in the Pell case, *supra*, "he cannot be regarded as a purchaser in good faith who negligently and willfully closes his eyes to visible pertinent facts, indicating

adverse interest in or encumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when, by the exercise of prudent, reasonable diligence, he could fully inform himself of the real facts of the case." The plaintiff here, having purchased land in the possession of a third person, had no right to rest upon the record title alone in making the purchase, but was required to look beyond the record title for the purpose of ascertaining what rights and equities, if any, Richard Thomas, the party in possession at the time of the alleged purchase, had in the premises. (*Security etc. Co. v. Willamette etc. Co.*, 99 Cal. 636, [34 Pac. 324].) A little inquiry or the exercise of common or ordinary diligence would have readily developed to him, it seems to us, that Richard Thomas either had a valid title to the land, acquired by gift from his parents, or that he was made to believe and, therefore, honestly believed, that he owned such a title, and that under such belief he made expensive improvements, which, under the circumstances, vested in him an equity in the premises of which he could not wantonly be divested, or of which he could not be deprived without reimbursement or just compensation. Even, therefore, if it be conceded that Richard Thomas did not acquire a title to the land by reason of the failure of one of the spouses to join in the gift, inquiry by the plaintiff would have disclosed circumstances, as certainly such circumstances are shown here, entitling Richard to reimbursement for the improvements he put upon the land as a condition precedent to the right of plaintiff to the equitable relief demanded by his complaint. In other words, having appealed to equity for relief, he could not expect equitable aid without doing or offering to do that equity to which inquiry must have shown him that Richard was entitled.

From every viewpoint, the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 15, 1912, and the following opinion then rendered thereon:

HART, J.—The petition points out that, in the original opinion herein, we did not directly pass upon the contention, urged by counsel for the plaintiff in their brief, "that a homestead cannot be alienated in any manner whatsoever, except as prescribed by the code," and that, inasmuch as the code provides that "the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife" (Civ. Code, sec. 1242), a parol gift of real property upon which the homestead of a married person subsists at the time of such gift is absolutely void and cannot, therefore, be enforced, notwithstanding that such gift may be the result of the joint act of both spouses for whose benefit such homestead has been declared.

While it is true that we did not discuss this precise question in the original opinion, the necessary effect of the decision is that a parol gift of real property by the husband and wife, for whose benefit a homestead had been declared thereon and is in existence at the time of such gift, may and will be enforced by a court of equity where the circumstances of such gift are similar to those under which a like gift of real property not impressed with a homestead will be so enforced. In our original investigation of the questions presented by this record, we conceived the settled rule to be as above stated, and, therefore, regarded a discussion of the point pressed in the petition rather as supererogatory than necessary.

All that counsel say respecting the legal requisites which our code prescribes shall be observed in order to legally abandon or convey or encumber the homestead of a married person must be conceded to be sound. And, as counsel declare, our supreme court, in the cases of *Matthews v. Davis*, 102 Cal. 202, [36 Pac. 358], *Hart v. Church*, 126 Cal. 471, [77 Am. St. Rep. 195, 58 Pac. 910, 59 Pac. 296], and *Friermuth v. Steigleman*, 130 Cal. 392, [80 Am. St. Rep. 138, 62 Pac. 615], has very clearly shown that the homestead of a married person cannot be abandoned, conveyed or encumbered, except by a substantially strict compliance with the methods prescribed by the statute for the achievement of any of those ends. The absolute soundness of the conclusions arrived at in those cases cannot for a moment be questioned.

But, as we view the proposition now submitted in the case at bar, the question discussed and decided in the cited cases does not arise here. The question here is not whether the parents of Richard Thomas undertook to convey a portion of their homestead without the observance of the *legal* requisites essential to the conveyance of such right or title to the property involved, but whether the circumstances attending their joint gift of said property to their son are such as to justify a court of equity in denying to them the right to repudiate such gift for any legal as distinguished from equitable reason that might, in an action at law, operate to invalidate such an agreement.

The doctrine that verbal contracts for the sale of land, if part performed by the party seeking the remedy, may be specifically enforced, is an elementary principle in equity jurisprudence and of universal application throughout the American states. Indeed, it had its origin in English chancery law, and merely means, where invoked, the application of the doctrine of equitable estoppel to those unconscientious transactions which, though sustainable in law, courts of equity frown upon and will not uphold. In other words, the enforcement by courts of equity of verbal contracts for the sale or conveyance of land does not proceed upon the theory that the statutes requiring contracts for that purpose to be in writing are invalid or should not be strictly adhered to, but solely upon the theory that a party entering into a verbal agreement to convey his land to another should not be permitted in equity to withdraw therefrom or refuse to execute such agreement and to shield such act, if the same be unconscientious and will operate as a fraud upon the rights of the other party, behind the statute. And we have been shown no reason, and we frankly confess that we can conceive of none, why an oral agreement to sell land upon which there subsists at the time of the making of such agreement a homestead of married persons, such agreement having been jointly made by the husband and wife for whose benefit such homestead has been declared, should not as well, when the exigencies of the situation justify it, be subject to the government of equitable principles, appropriate in equity to such agreements, as are such agreements involving real property upon which there is no homestead.

The legislature obviously conceived and evinced in the statute concerning the transfer generally of real property no less solemnity in the act of conveying such property upon which there is no homestead than in the act of transferring the homestead of a married person, for section 1091 of the Civil Code provides that "an estate in real property other than an estate at will or for a term not exceeding one year, can be transferred *only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same*, or by his agent thereunto authorized by writing." No less or no more is required for the transfer of a homestead of a married person, and if, as is admitted to be true, an oral agreement for the sale of real property not embarrassed by a homestead may, under certain conditions, be enforced in equity, upon what principle or rational course of reasoning may it be held that such an agreement involving property upon which there is a homestead of a married person may not, under similar conditions, likewise be enforced? None can, in our opinion, be suggested.

As stated, equity does not interpose relief as to such agreements upon the theory that the statutory requirement that they shall be committed to writing in order to be enforceable in law is invalid or should not be complied with. On the contrary, equity regards such statutory requirements as of binding force in law; but, acting *in personam* and operating directly upon the consciences of the parties to such agreements, equity merely says that a party to such an agreement will be estopped from standing on his *legal* rights in support of his refusal to carry out his part of the agreement, where the circumstances, as here, disclose that such conduct on his part would be unconscientious and work a fraud upon the rights of the other party.

As shown in the original opinion, the court found from sufficient evidence that the parents of Richard Thomas agreed to give him the land in controversy upon the condition that he would establish a home upon it; that he accepted the gift upon that condition, in execution of which he purchased a house, removed it to the land, erected a barn on said land, planted it to trees, filled it in with dirt, and otherwise improved and equipped it for the purposes of a home; that he took up his residence on the place and there resided, claiming it as his

own, for a considerable period prior to the death of his mother and for a greater period before his father executed the conveyance of the land to the plaintiff; that his claim of ownership of the land after he had improved it as described at great expense was acquiesced in by his parents up to the time of the death of his mother; that the improvements he put upon the lands so enhanced the value of the property that, whereas it was of no greater value than \$75 when it was given to him, at the time of the attempted conveyance of it by his father to the plaintiff in consideration of the sum of \$10, it was valued at \$1,500. To say that upon these facts a court of equity is too impotent to afford relief or that the findings do not show a case for equitable interference and the application of the doctrine of equitable estoppel against the claim that the gift is nonenforceable because it involved an attempt, futile in law, to transfer the homestead of the donors, would, in our judgment, be a reproach upon that branch of our system of jurisprudence justly distinguished for the efficacy of its remedial power in those cases which, like this, would, but for such interference, stand as exemplars of the rankest injustice sanctioned only by the unyielding obstinacy of legal rules.

We are unable to agree with counsel for the appellant upon the proposition herein discussed, and a rehearing is, therefore, denied.

Burnett, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1912.

[Civ. No. 904. First Appellate District.—April 17, 1912.]

EDWARD F. DELGER, Respondent, v. ABE JACOBS, Appellant.

APPEAL—ABSENCE OF ARGUMENT—AFFIRMANCE OF JUDGMENT.—Where no briefs have been filed by either party, and no oral argument was made when the case was regularly called upon the calendar, the judgment will be affirmed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

L. S. Melsted, for Appellant.

Sullivan & Sullivan, and Theo. J. Roche, for Respondent.

THE COURT.—No oral argument having been made when the appeal in this case was regularly called upon the calendar of this court, and no briefs having been filed by either party, it is ordered that the judgment appealed from be affirmed.

[Civ. No. 941. First Appellate District.—April 18, 1912.]

THE PEOPLE ex rel., Plaintiffs, v. MARKET STREET BANK, an Insolvent Corporation, et al., Defendants; KELLEHER & BROWNE, Claimants, Appellants; LOUIS H. MOOSER, as Receiver of Insolvent Bank, Respondent, and WILLIAM GREER HARRISON, as Receiver of MARKET STREET SECURITIES COMPANY, Reorganized Bank, Claimant, Respondent.

INSOLVENT BANK—REHABILITATION BY NEW BANK—EXCHANGE OF CLAIMS FOR BONDS—DIVIDEND—AGREEMENT FOR REASSIGNMENT—EXECUTED PAYMENT OF DEBT—RIGHTS OF RECEIVER OF NEW BANK. Where an insolvent bank was sought to be rehabilitated by a new bank, which took assignments of its claims and issued its bonds to the claimants, and a dividend of fifty cents on the dollar was declared by the insolvent bank, and appellants, as claimants of bonds, being indebted to the receiver of the insolvent bank for

rent in \$875, procured \$1,750 of bonds to be delivered, on account of dividends, to pay such debt in full, and agreed with the president of the new bank for a reassignment of the residue of the bonds, that he might receive his share of the residue of the dividend, but before such agreement was executed, the receiver of the new bank repudiated the transaction, it is held that the court properly approved of the payment of such debt, and properly ordered the residue of the uncollected claims of appellants to be turned over to the receiver of the new bank.

APPEAL from orders of the Superior Court of the City and County of San Francisco made in a proceeding for the liquidation of the affairs of an insolvent bank. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Percy L. Shuman, for Appellants.

Stratton & Kaufman, for Louis H. Mooser, Receiver of Insolvent Market Street Bank, Respondent.

J. C. Campbell, for William Greer Harrison, Receiver of Market Street Securities Company, Reorganized Bank, Respondent.

KERRIGAN, J.—On June 25, 1908, the Market Street Bank of San Francisco, a corporation, was adjudged insolvent, and Louis H. Mooser was appointed receiver thereof to liquidate its affairs. Shortly thereafter certain persons interested in various ways with the bank conceived a plan of rehabilitating that institution, and for the purpose of carrying out that plan organized a corporation under the name of the Market Street Securities Company. That corporation issued to the creditors and depositors of the Market Street Bank bonds in exchange for claims and accounts against the bank, the ultimate purpose being to buy in, if possible, all of the bank's outstanding obligations. Subsequently the securities company passed a resolution and gave public notice to the effect that if the proposed rehabilitation of the insolvent bank was not successful, it would return the claims, consisting of bank books and other evidences of indebtedness, to the parties who had assigned them to the securities company,

upon the return of the bonds issued therefor, subject to the condition that the bonds returned must be the identical bonds issued to the depositor or creditor in exchange for the assignment of his claim.

The terms of this resolution are not contained in the transcript, but its existence seems to have been recognized by the parties to the litigation, and its terms are to be gathered from the briefs of counsel. It has, however, but a remote bearing upon the questions involved in the appeal, as the rights of the appellants, if any, arise out of a specific agreement alleged to have been made between them and the securities company.

Among other creditors of the insolvent bank who entered into the plan of its rehabilitation was the firm of Kelleher & Browne, appellants herein, who became the owners of some \$8,000 worth of the bonds of the securities company issued as indicated, part thereof being in exchange for their deposit account with the insolvent bank, and the remainder having been acquired by them either directly from the securities company in exchange for assignments of other accounts against said bank, or intermediately from persons to whom they had been directly issued.

Kelleher & Browne were tenants of the Market Street Bank, and it is undisputed that they were indebted to Louis H. Mooser, as receiver, in the sum of \$875 for unpaid rent.

Upon a sale of the assets of the insolvent bank the court, on or about February 4, 1909, declared a dividend of fifty cents on the dollar to be paid to the owners and holders of claims against said bank.

On January 7, 1909, the appellants, although they at this time were merely the owners of bonds of the securities company, filed a claim with the receiver of the insolvent bank for some \$8,000, apparently in anticipation of redelivering their bonds to the securities company and receiving from it the claims and accounts for which the bonds had been issued, and they indorsed upon this claim an assignment of the sum of \$875 thereof to Receiver Mooser to enable Mooser to retain this sum out of any money becoming payable by him to the appellants.

In the month of June, 1909, appellants arrived at an agreement with the securities company, through its president, F. M. Meigs, for the return to that company of the bonds held by

them in exchange for the claims against said insolvent bank for which the bonds had been issued. In order to carry into effect this agreement Meigs delivered to Receiver Mooser claims against the insolvent bank amounting to something over \$6,000 for the purpose of receiving from Mooser the fifty per cent dividend upon said amount of claims and paying the same to appellants, the latter in the meantime retaining their bonds. About this time appellants delivered to Receiver Mooser bonds of the face value of \$1,750, for the purpose of enabling Mooser to retain, in payment of the rent due him from them, the sum of \$875—the amount of the dividend payable on the claims represented by said bonds. Mooser delivered these bonds to the securities company, the secretary of which marked them “Paid,” and it was upon this day or about this time that Mooser received from the securities company the \$6,000 worth of claims above referred to. Out of this amount of claims Mooser, with the acquiescence of the securities company, selected certain of them to the amount of \$1,750, and retained the dividend payable upon them—amounting to \$875—in settlement of the rent due from Kelleher & Browne, giving them credit accordingly. He also delivered to Meigs, said president, a check for \$1,500 on account of and as part payment of the dividend payable on the remainder of said claims. Meigs brought this check to appellants, who refused to accept it, claiming to be entitled to the dividend upon the whole \$6,000 worth of claims. Shortly thereafter, by reason of an injunction suit, the payment of this check was stopped, and William Greer Harrison, who in the meantime had been appointed receiver of the securities company, refused to recognize the agreement made between Meigs and appellants, and now claims to be entitled, as receiver of the securities company, to the unpaid dividend on the remainder of said claims.

Petitions were filed by both Harrison and the appellants, each claiming to be the owner of the whole of said claims and entitled to the dividend thereon. Receiver Mooser answered, setting up the payment to himself as receiver of the \$875 as aforesaid in satisfaction of the rent due from the appellants, and leaving himself at the disposition of the court as to whom he should recognize as the owner of the claims upon which the dividend was still unpaid.

The court, after hearing the testimony, made two orders, one approving the action of Mooser in retaining the said \$875, and the other ordering him to turn over to Harrison, as receiver of said securities company, the remainder of said claims delivered to him by Meigs as aforesaid.

Kelleher & Browne appeal from both said orders. They claim, as against Harrison, to be the owners of the claims; and as against Mooser, that he accepted certain specific bonds of the face value of \$1,750 in payment of his rent, and that the claims the dividend upon which he paid to himself were not those for which said bonds were issued, but were claims issued against bonds owned and still in the possession of appellants—from which it is argued that the receiver has twice been paid the rent due him.

We think both the orders appealed from were correct and proper.

As to the order concerning Harrison, the execution of the agreement between Meigs and appellants did not proceed far enough to give to the latter any valid title to the claims. If, instead of allowing the transaction to proceed as it did, the appellants had themselves taken from the securities company a reassignment of the claims, and redelivered to that company the bonds, the transaction would have been complete, and would have resulted in substituting appellants as the owners of said claims. But the transaction followed a different course. Meigs proceeded himself to collect the dividend on the claims—undoubtedly with the intention of turning it over to appellants and receiving from them the bonds when he should do so. He even offered them the first and only payment that he received from Mooser on account of the dividend; and this the appellants very ill-advisedly rejected. The securities company had received nothing from the appellants under this agreement, and upon the rejection by appellants of the check for \$1,500, it had the right not to proceed any further in the transaction—which course Receiver Harrison, who was subsequently appointed, chose to pursue.

As to the order permitting Mooser to retain the \$875, dividend on \$1,750 worth of claims delivered to him by Meigs, it must not be overlooked that the appellants had themselves assigned to Mooser so much of their claims as this dividend would represent; and although at the time they did so they

had no title to the claims, yet when the securities company subsequently delivered such claims to him for the benefit of the appellants, the assignment became operative and immediately vested in him the right to retain the dividend on the amount of claims covered by the assignment. The contention that Mooser accepted \$1,750 in bonds of the securities company in payment of the rent is untenable. While the reading of the receipt given by Mooser for the bonds might lend color to this contention, yet it is quite apparent that appellants contemplated that the possession of the bonds entitled Mooser to the same value in claims to be received from the securities company; the securities company turned over to Mooser all the claims which the appellants claimed to be entitled to by virtue of their ownership of bonds, if the exchange arranged with Meigs should be effected; and out of such claims Mooser selected only sufficient to pay him the amount due from appellants. The claim is made by appellants' counsel that Mooser surrendered the \$1,750 of bonds to the securities company without receiving anything therefor—intending it to be inferred that appellants suffered some prejudice thereby, and that the claims, for which the particular bonds surrendered had been issued, were negligently left with the securities company. An examination, however, of the record shows that the majority of the claims issued for this particular \$1,750 worth of bonds were among the \$6,000 of claims delivered by the securities company to Mooser. That Mooser did not select these particular claims on which to pay himself the dividend did not work any prejudice whatever to the appellants, for had he done so the claims and accounts on which he did actually pay himself the dividend would be included in the amount ordered by the court to be turned over to Receiver Harrison.

The orders appealed from are affirmed.

Hall, J., and Lennon, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 18, 1912, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1912.

[Civ. No. 1074. Second Appellate District.—April 18, 1912.]

F. X. EBERLE et al., Petitioners, v. A. A. HUBBARD et al., Respondents; HENRY LUDWIG et al., Interveners.

EMINENT DOMAIN—LANDS CONDEMNED FOR STREET WIDENING—ASSESSMENTS IN TREASURY—MANDAMUS—APPEAL PENDING NOT CONSIDERED—ABSENCE OF STAY.—Where lands were condemned in an action for street widening, and the assessments were collected and paid into the city treasury, and there was no appeal from the judgment of condemnation, and the trial court decided in favor of the validity and regularity of the proceedings, and there was no stay pending an appeal involving such validity and regularity, a proceeding in *mandamus* to compel the payment of such funds in the treasury to the property owners cannot serve to review the correctness of the action of the trial court; and where the board of public works refused to draw warrants for such funds in favor of the property owners, pending such appeal, a peremptory writ of mandate will be granted to compel such action.

ID.—REHEARING—AFFIRMANCE OF JUDGMENT APPEALED FROM—PEREMPTORY WRIT.—Where a rehearing was granted for further consideration, and pending such rehearing the judgment of the trial court as to the validity and regularity of the proceedings for condemnation was affirmed upon appeal, and upon such rehearing the original opinion was adopted and approved, the peremptory writ of mandate must issue in accordance therewith.

APPLICATION for writ of mandate to the Board of Public Works of the City of Los Angeles.

The facts are stated in the opinion of the court.

Thomas C. Ridgway, and Hatch, Lloyd & Hunt, for Petitioners.

John W. Shenk, City Attorney, and Myron Westover, Deputy City Attorney, for Respondents.

Trippet, Chapman & Biby, and Valentine & Newby, for Interveners.

THE COURT.—An opinion herein was filed in this court on January 15, 1912, wherein, upon application of petitioners, a peremptory writ of mandate was ordered to be issued as

prayed for. Thereafter, upon application of respondents and intervenors, a rehearing of said matter was ordered. In view of the fact that this court has filed an opinion, April 2, 1912, affirming the judgment of the trial court in the case of *S. M. Bernard Co. v. City of Los Angeles*, ante, p. 626, [124 Pac. 88], (Civil No. 1127), wherein this proceeding originated, and, upon further consideration of the matter, being fully satisfied with the opinion heretofore filed herein, we readopt the same as the opinion of the court. The opinion referred to follows:

"After due proceedings had preliminary thereto, the city of Los Angeles, on July 3, 1907, brought an action to condemn certain lands for the purpose of adding to the width of Eighth street in said city. Interlocutory judgment was thereafter entered, determining the amount of damages to be paid for the taking of the land. Assessments were then levied upon the property of a benefited district duly described by ordinance, and subsequent thereto the sum of \$161,454.48 was collected on these assessments for the purpose of paying the damages fixed by the court in the condemnation proceeding. This money was placed in a special fund in the city treasury where it has since remained. All the petitioners, except Sarah M. Hamble, are property owners who were awarded damages. No appeal was taken from the judgment of condemnation and that judgment has become final. The defendants constituting the board of public works of the city of Los Angeles refuse to order warrants to be issued in favor of petitioners, and the defendant treasurer refuses to pay to petitioners the amounts severally awarded to them by the court. For answer to the alternative writ issued herein, the defendants set up that an action is now pending on appeal in the supreme court, wherein the validity and regularity of the proceedings had and taken in the matter of the widening of Eighth street are brought into question, and that the city of Los Angeles has withheld payment of the awards for damages pending final decision in the case mentioned. The suit referred to was one in which one Bernard and others, owners of property which was assessed to pay the cost of the street improvement, sought to have the proceedings declared void and to have injunctive relief preventing a sale of their properties on account of delinquent assessments. The trial court refused the relief asked for and decreed that the proceedings for the widening

of Eighth street were regular and valid. An application, made after judgment, for an injunction staying proceedings pending appeal was also denied. An appeal was then taken from the judgment and from the order so made after judgment. A number of the plaintiffs who appeared in that action have filed here a complaint in intervention opposing the petitioners in this suit. It is alleged in this complaint, after setting up the facts relative to the action last referred to, that the intervenors have since paid the amounts assessed against their property, but under protest and because only of the threat of the board of public works to sell their property to satisfy the amounts levied against it; and that they have notified the city of Los Angeles that they will look to it for the return of the money so paid in the event it shall finally be held that the street proceedings are invalid. The defendants, representing the city of Los Angeles, do not offer as a reason why refusal is made to disburse the fund collected for the benefit of the property owners whose property was adjudged to be damaged by reason of the proceedings, that any irregularity or informality exists in such proceedings, such as might render title to the money constituting this fund questionable, and, moreover, all of those matters have been properly submitted to a trial court which has made its determination of the issues so presented adverse to the intervenors who appear here. It is not proper, in our opinion, to make this proceeding in *mandamus* serve to review the correctness of the conclusions reached by the trial judge in the action which is now pending in the supreme court. The trial court not only passed upon the issues presented, which were all resolved in favor of the city, but considered and refused an application made on the part of the intervenors for an injunction to stay proceedings pending appeal. The hands of the officers of the city were left untied, and it became their plain duty under the law to proceed with the adjustment of the judgment claims of petitioners. In its practical effect, the contention of the intervenors is that the trial court should have granted an order staying proceedings, and having failed to do so, that this court should now review that action and withhold a mandate requiring the city officials to proceed in accordance with law. No doubt had the city consented to the granting of an injunction, to operate as a *supersedeas*

pending appeal, an order providing for such stay would have been made by the trial court. Having insisted, as we may presume defendants did insist, that they be left free to act and bring to a close the proceedings for the opening of Eighth street, complaint cannot now be heard on their behalf because such action may be compelled to be taken on their part as the law requires them to take.

"We think that neither the defendants nor the intervenors have shown sufficient cause why the judgment of this court, exercised within the limits of a reasonable and just discretion, should deny the relief sought by petitioners.

"A peremptory writ of mandate is ordered to be issued."

[Civ. Nos. 959, 1110. Second Appellate District.—April 19, 1912.]

C. W. ROGERS, Respondent, v. WEST RIVERSIDE 350-INCH WATER COMPANY, a Corporation, Appellant.

WATER RIGHTS—CONVEYANCE OF CANAL—RESERVATION OF EASEMENT—PROPORTION OF EXPENSE—INCREASE BY MODE OF DIVERSION.—Where a deed of a canal by the defendant to plaintiff's grantor reserved a perpetual easement to carry through the same three hundred and fifty inches of water for delivery to defendant's customers, at any point to be selected, subject to a proportionate share of the expense of maintaining the canal, and where, instead of one point of delivery, the defendant was allowed to select and maintain twenty-eight gates for the convenience of its customers, the plaintiff was thereby required to incur the expense of assistants to superintend the proper delivery of the water through all of such gates, and all expenses incident to such increased care and maintenance of the delivery of defendant's water is justly chargeable to defendant's proportionate share of the whole expense of maintaining the canal.

ID.—PROPER ASCERTAINMENT OF PROPORTIONATE SHARE OF EXPENSE—END OF IRRIGATING SEASON—CONSTRUCTION OF CONTRACT.—The court properly ascertained the proportionate share of expense chargeable to the defendant at the end of each irrigating season. The words "from time to time," as used in the contract, were intended by the parties to apply to and mean successive irrigating seasons. The expense chargeable is not ascertainable or payable until the season is closed. It is ascertained by taking the entire expense of maintaining and repairing the canal during the whole season, as the

common denominator, for ascertaining the proportionate share of expense chargeable to each during the season. Defendant's share of the expense of maintenance is such proportion thereof as three hundred and fifty inches of water bears to the whole number of inches passed through the canal during the season.

ID.—BREAK CAUSED BY TURNING IN TOO MUCH WATER—INJUNCTION—OBLIGATION TO REPAIR—FUTURE RECOVERY OF PROPER PROPORTION—MODIFICATION OF IMPROPER ALLOWANCE.—Where the uncontradicted evidence shows that a break in the canal in the early part of an irrigating season was caused by the plaintiff knowingly turning in too much water for its weight, though he was enjoined from diverting the same, the expense of repairing such break must fall upon him in the first instance, relying solely thereafter upon his right of recovery for the proper proportion due from the defendant; and the court erred in prematurely charging the defendant with a share of such expense, and its judgment must be modified by deducting such improper allowance.

APPEALS from a judgment of the Superior Court of Riverside County, and from an order denying a new trial. Benjamin F. Bledsoe, Judge Presiding.

The facts are stated in the opinion of the court.

Collier, Carnahan & Craig, for Appellant.

E. W. McGraw, Lafayette Gill, and Purington & Adair, for Respondent.

ALLEN, P. J.—No. 959 is an appeal from the judgment, while No. 1110 is an appeal from an order denying a new trial. The two appeals, by an appropriate order of the supreme court, have been transferred to this court for hearing and decision, and both of such appeals are heard and determined upon the same transcript, the questions involved in each being identical.

Plaintiff, the owner of a canal constructed for the purpose of conveying irrigating water, brought this action against defendant, the owner of an easement in said canal, to recover an alleged proportion of the expenses due plaintiff for the maintenance and repair of such canal. The canal, as constructed and operated during all of the time mentioned in the complaint, had a carrying capacity of more than one thousand inches of water; the eastern division thereof ex-

ceeded seven miles in length, while the entire canal exceeded ten miles in length. Plaintiff owned none of the water carried in said canal, but the same was operated entirely for the benefit of irrigators possessing rights to water carried there-through. Defendant originally owned the canal, or that portion of it constructed prior to 1890, in February of which year it conveyed the canal so owned by it to plaintiff's predecessor in interest, in which conveyance the following reservation was made: "Hereby especially reserving, however, the perpetual right of way to carry through such canal the 350 inches of water, being the same 350 inches of water reserved by first party in its conveyance of other waters to second party by indenture dated May 23, 1888, recorded," etc., "subject, however, to first party's paying the proportion of the entire expense of maintaining and repairing such canal that 350 inches of water sustains and bears to the entire amount of water from time to time being carried through said canal." By the terms of the original reservation this three hundred and fifty inches of water was to be diverted and measured at a certain ranch line. Before this conveyance was made, defendant and plaintiff's predecessor in interest had entered into an amendment to the agreement by which it was especially understood that defendant should have the right to divert and use its three hundred and fifty inches of water at any point it might see fit, the water to be measured at the place of diversion under a four-inch pressure of a continuous flow, and no more.

It is obvious from an examination of the record that all of the water so reserved by defendant and to be by it carried through and diverted from such canal was water to the use of which the stockholders in defendant corporation, the owners of land and irrigators under such canal, were entitled; that as a fact defendant never diverted or measured the water to which it was entitled at any point selected by it, but, on the contrary, twenty-eight or twenty-nine gates were maintained along the canal, at each of which gates one or more of the stockholders received water for the irrigation of their lands, and plaintiff, through his servants and agents, maintained a constant supervision over such gates and the distribution of the water from the same, to the end that defendant's stockholders received their irrigating water at such times and

in such volumes and heads as best suited their interest in the matter of irrigation; that to maintain this supervision plaintiff gave his time individually, was required to and did rent an office, where the business of the canal was conducted, hiredzanjeros and other people, and actually expended a large amount of money in the maintenance and repair of the canal, including its supervision and the division of the waters carried through the same.

The court found that the amount of water from time to time carried through the canal was less than nine hundred inches. It is evident that the court arrived at this statement of fact in the findings through a consideration of the average amount of water carried from time to time through the irrigating season of each year, which average amount the court fixed as the denominator of the fraction which should control in fixing the proportion which defendant should pay toward the cost of maintenance and repair.

The principal contention of defendant is that the maintenance charges imposed through the terms of the reservation were simply those incident to keeping the canal in condition for the transportation of water to be used in irrigation by those entitled to its use. This reservation clause was the subject of consideration in *Rogers v. Riverside Land etc. Co.*, 132 Cal. 9, [64 Pac. 95], where it was said by the court: "The proper construction of the terms, as used in the reservation contained in the deed to the Stearns Ranchos Company, would seem to be that the canal or ditch should be kept in such condition as to enable the owners of water, who have the right, to have the same carried or conveyed through said ditch or canal unobstructed, and with as little loss as possible, and so as to prevent others from using or appropriating the quantity to which they may be entitled." The allegations of the complaint and the findings of the court that, under the terms of the easement, defendant had the privilege of diverting the three hundred and fifty inches of water at such places as it might wish to use the same, evidently refer to the division and use of the entire amount of water which defendant was entitled to have carried through the canal, not that a number of points of diversion were to be used for portions thereof by way of distribution to irrigators. But be that as it may, the sole duty still devolved upon plaintiff, through the obligation

of maintenance, to see to it that others did not use any of the quantity to which defendant was entitled. This in the very nature of things could only be accomplished through a supervision, management and control of the water delivered to the respective users thereof. It affirmatively appears from the answer of defendant that all of the water so carried under the reservation was water owned by the irrigators. In other words, the defendant as a corporate agency of the irrigators was conveying for delivery to those who owned the water the amount to which each was entitled for use in irrigation. While the defendant had evidently parted with its ownership of the water, if such it ever possessed, nevertheless it still was bound to cause the water to be carried to the points of diversion and there, under the maintenance clause, to be delivered by plaintiff without unnecessary loss and in such manner as to prevent appropriation thereof by those not entitled thereto. Conceding that under a strict construction of the easement clause, defendant would have been entitled to divert the entire amount of water to which it was entitled at a single point, and thereby reduce to a minimum the cost and expense incident to such oversight by plaintiff with reference to preventing the misappropriation by others of such water, yet defendant did not so elect to proceed; but, on the contrary, acquiesced and presumably authorized the delivery by plaintiff at many points convenient for the use of irrigators, thereby increasing the cost of maintenance. We are of opinion, therefore, that under a proper construction of the maintenance clause in the reservation, plaintiff was bound to see to it that all of the water so transported through the canal was delivered to the persons entitled thereto in such quantities as each was entitled to receive, and that any and all expense incident to such oversight and distribution of the water became and was a part of the maintenance of the canal, under the construction of the supreme court heretofore referred to. This being true, there is evidence to be found in the record sustaining the findings of the court with reference to the amount so found to be due for such maintenance. We are of opinion that the services rendered by plaintiff himself in supervision and through his *zanjeros*, the rent of an office, and all of the matters found by the court to be proper matters of maintenance, as set forth in the bill of particulars, were in fact

proper charges of maintenance and were properly allowed by the court in that regard. Entertaining these views, it is unnecessary to pass upon many other specifications of error with reference to the introduction and exclusion of testimony, the determination of the questions involved being included within the matter hereinbefore determined. Neither do we see any error in the action of the court in its determination that the average amount of water carried during the irrigating season was the proper denominator in determining the fractional amount which defendant should pay toward the cost of maintenance. The words "from time to time," as used in the contract, were intended by the parties to apply to and mean the successive irrigation seasons, which may or may not be coextensive with the year. The "entire expense of maintaining and repairing such canal" for such time or irrigation season is the expense incurred during the whole season, and hence cannot be determined and is not payable until the close of the season. The average flow of water during this period constitutes the entire flow for such time, and defendant's proportion of the expense for repairs and maintenance during such period is such part thereof as three hundred and fifty inches bears to the average number of inches, counting the three hundred and fifty inches whether carried or not, conducted daily through the canal during such season. Otherwise, plaintiff might select a month when none or but little water was being carried through the canal, and during such month clean the canal and make the necessary repairs thereof required for the entire season, and thus charge the whole of such expense to defendant. The complaint divides the time from November 1, 1906, to May 1, 1908, into four periods, the expenditures during each period being set forth in a separate count. As to each one of these periods, however, the court found that the average flow of water was less than nine hundred inches and fixed nine hundred inches as the basis upon which to determine the amount due from defendant. Hence, such division of the year into periods and findings made in no wise prejudiced defendant, for the result would have been the same had it been based upon the irrigation season. Likewise with the period extending from May 1, 1908, to September 1, 1908, covered by the fifth cause of action, and wherein the court found the average flow of water to be one

thousand inches. For aught that appears in the record, this was the irrigation season.

There remains, then, but one question of serious import presented by appellant, and that is with reference to plaintiff's right to recover for repairs occasioned by a break in the canal which occurred in May, 1908. The uncontradicted evidence shows that a break occurred in the canal on the 29th of May, 1908, and that the same was occasioned by plaintiff turning the water into the canal at a time when he knew from its condition that it would not sustain the weight of such water. The repair work made necessary on account of this break was shown to have been performed and expenses connected therewith incurred between the 29th of May and the 3d of June. While the record does not disclose the exact amount allowed by the court on account of the repairs occasioned by such break, plaintiff testified that the bill for \$322.40 allowed by the court, generally speaking, was for repairing this break. This is the only amount which is definitely shown to have been expended in connection therewith. Appellant's contention is that this break was occasioned through the negligence of the plaintiff in turning in the water at a time when he knew disastrous results would follow, and that he should not be allowed to recover on account of such negligent management of the ditch. It is clearly established, to our minds, that prior to the break a demand was made upon defendant to pay its proportion of the expense of maintenance and repairs and that defendant refused to make such payment unless plaintiff would accept a sum in full settlement much less than that due. It is true that among the findings of fact we find the conclusion of the court that no proper demand for the proportion of the expense of maintenance was made by plaintiff before the break occurred. It does appear, however, that demand was made and were it material, we should have no hesitancy in saying that this conclusion of the trial court was unfounded. But we are confronted with the decision of the supreme court in *Smith v. Stearns Ranchos Co.*, 132 Cal. 180, [64 Pac. 261, 716], in which it is held, in effect, that under the agreement connected with the operation of the ditch the duty devolved upon plaintiff to maintain and repair the same, relying solely thereafter upon his right of recovery for the proper proportion due from the defendant. Were the ques-

tion an open one, we would have no difficulty in resolving this question in harmony with the dissenting opinion of the chief justice in the case last above cited, but do not, in view of the majority opinion, feel that we are warranted in disregarding such opinion, the effect of which is to place plaintiff in a very peculiar position. An injunctional order compels him to maintain the flow of water in the canal; in obedience to this order he does so, and yet he is made chargeable with the results which follow. Regardless, however, of this apparent hardship, it seems to be written in the law that plaintiff is so obligated. Accepting, as we feel we must, the doctrine of the Smith case, we must hold that the allowance of 326.5807-nine hundredths of \$322.40 made by the court was an improper allowance, under the circumstances of the case.

We find in the record no other reversible error and feel that this is a proper case in which to direct a modification of the judgment. It is, therefore, ordered that the judgment of the trial court be modified by deducting therefrom the sum of \$116.99, and as so modified the judgment and order are affirmed; appellant to recover one-half of costs of appeal.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 18, 1912, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1912.

[Civ. No. 977. Third Appellate District.—April 19, 1912.]

GUY J. K. BIGELOW, Respondent, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF SONOMA et al., Appellants.

"LOCAL OPTION" IN SUPERVISORIAL DISTRICT—TIME FOR ELECTION—"PRIMARY ELECTION" NOT "GENERAL"—MANDAMUS FOR "SPECIAL ELECTION."—The "primary election" held May 14, 1912, to choose nominees for the presidency at the national conventions of the respective political parties is not a "general election," within the meaning of the "local option" law of 1911, providing for the submission of the question "whether the sale of intoxicating liquors shall be licensed in a" specified "supervisory district, outside of cities and towns," and where the board of supervisors, in violation of that law, fixed such "presidential primary election" as the time for holding such "local option election," *mandamus* will lie to compel the board to meet and rescind such order, and to call a "special election" in pursuance of said law within not less than thirty nor more than fifty days after the petition has been certified by the county clerk.

Id.—TIME FIXED BY LAW FOR HOLDING "PRIMARY" NOT A TEST OF "GENERAL" ELECTION—ESSENTIAL DISTINCTIONS.—The fact that the laws regulating "primary elections" held in May and September fix a regular time for the holding and recurrence of the same does not render such "primary elections" general elections. In order that an election must be "general" in the true sense employed by the legislature, the election must be one at which every qualified voter of the state, district, or division of the state, where required by law to be held, shall have the right to cast his ballot therein for whomsoever he pleases. But the primary election laws place limitations upon this right to the preference of candidates of a particular party, and take away the right when the registration expresses no party affiliation.

APPEAL from a judgment of the Superior Court of Sonoma County enforcing a *mandamus*. Thos. C. Denny, Judge.

The facts are stated in the opinion of the court.

Clarence F. Lea, G. W. Hoyle, and J. W. Ford, for Appellants.

Ross Campbell, and R. L. Thompson, for Respondent.

CHIPMAN, P. J.—It appears from the complaint that a petition was filed with defendant board, signed by the requisite number of qualified electors of the first supervisorial district of Sonoma county, praying that the said board call an election at which should be submitted to the electors of said district the following proposition: "Shall the sale of alcoholic liquors be licensed in this supervisorial district outside of incorporated cities and towns?" That thereafter, to wit, on March 7, 1912, the county clerk and *ex-officio* clerk of said board duly certified said petition as sufficient and presented the same to the said board as required by law; that in violation of law the said board did, on March 8, 1912, at a regular session thereof, "call a pretended election for May 14, 1912, and at a time more than sixty days from the time said petition was certified as aforesaid, and upon which said last-named date there is no general election to be held in said district, county or state."

The cause came on to be heard on March 16, 1912, and the court ordered the said board "to meet forthwith in legal session and rescind the order of said board made on March 8, 1912, setting an election to determine the question whether the sale of alcoholic liquors shall be licensed in the territory described in the petition, for May 14, 1912, and that they do forthwith make and enter an order of said board of supervisors setting a date for the holding of said election on a legal day not less than thirty days nor more than sixty days from the seventh day of March, 1912, and do and perform all necessary duties to call and hold a special election for the purposes aforesaid according to law."

Defendants appeal from this order and all parties have stipulated that, upon the decision of this court, *remittitur* issue forthwith.

The local option law, section 6, Statutes of 1911, page 601, provides that if the petition for an election is certified within six months and not less than forty days before the holding of "the next general state or general municipal election within the territory described, such question shall be submitted at said general election; otherwise a special election shall be held for such purpose within not less than thirty or more than sixty days after the petition has been certified."

Pursuant to the primary election law, approved April 9, 1911 (Stats. 1911, p. 769), as amended December 24, 1911

(Stats. 1911 [Extra Sessions], p. 66), May 14, 1912, has been designated as the day on which the electors, qualified to vote thereat, are authorized to select delegates "to the national convention to nominate candidates for President and Vice-president of the United States."

The sole question, therefore, is this: Is the presidential primary election a "general election" within the meaning of those terms as used in the local option law?

The Honorable Thomas C. Denny, trial judge, filed a written opinion in the case, which, we think, satisfactorily supports the order. We quote, in part, as follows:

"Section 1 of the 'direct primary law' provides that: 'The words and phrases in this act shall, unless such construction be inconsistent with the context, be construed as follows:

"'1. The words "primary election," any and every primary nominating election provided for by this act.

"'2. The words "September primary election," the primary election held in September to nominate candidates to be voted for at the ensuing November election.

"'3. The words "May presidential primary election," any such primary election, held in May of a bissextile or leap year, as shall provide for the expression of preference in the several political parties for party candidates for President and Vice-president of the United States and for the election of delegates to national party conventions.

"'4. The word "election," a general or city or city and county election as distinguished from a primary election.

"'5. The words "November election," the presidential election, the general state election, county, city or city and county election held in November.'

"It has been generally held that elections are either general or special, general elections being held at stated intervals upon specified dates, and special elections being those held at a time specified in the call for the election. But it seems to me that by the above-quoted section the legislature has recognized a third election in this state, viz., a primary election. This distinction seems also to have been recognized by all of the courts of last resort, as in none of the cases in which the primary election is under discussion is it ever referred to as a 'general' or a 'special' election, but always as a 'primary' election. (See *State v. Nichols*, 50 Wash. 508, [97 Pac. 728].)

"It is true, as counsel for defendant states, that section 1 of the 'direct primary law' merely defines the use of certain words as used in that act. But it seems to me that the legislature could not have intended that the words as defined therein should have a different meaning from that used in other acts. Thus, in subdivision 1 of section 1, they define the words 'primary election' as any and every primary election provided for by that act; in subdivision 4, that the word 'election' means a general election as distinguished from a primary election; subdivision 5, that the words 'November election' mean, among other things, the general state election. Can it be that we must take from these definitions the meaning that, in primary acts, these words have a distinct and different meaning from that used in the local option act passed at the same session as the presidential primary act? That the words 'November election' in one act means the general state election and that the words 'the general state election' as used in the local option act can mean anything else than the November election, It seems to me that the question must answer itself. And the primary act differentiates and distinguishes a general election from a primary election in such a distinct way that there can be no mistake in the matter.

"Counsel for the defendants also insist that it must have been the intention of the legislature that the presidential primary election should be a general election so far as the local option act is concerned, inasmuch as it is held generally throughout the state and it would get the voters out as a body. But is this position tenable? Would it not have the opposite effect?

"The primary act provides that only those may vote who have, at the time of their registration, designated the party with which they intend to affiliate. By this provision all those who at the time they register refuse to give their party affiliation and all those who register as independents are precluded from voting. It also provides that no political party that failed to poll at least three per cent of the entire vote of the state at the last general election may be represented on the ballot.

"There can be no question but that these provisions would prevent a large percentage of the voters in this state from participating in this election, who in consequence would not at-

tend the primary. While the local option act is a special election, and if held on the date of the presidential primary those who could not vote at the primary could vote on the local option matter, it is a probability that those who could not vote at the primary would be of the opinion that they could not vote on the local option question and so would not attend. Thus the privileged class of voters, who alone would be entitled to vote at the primaries, would be the only ones who would vote on the local option question. The legislature could not have had any such absurd condition of affairs in their minds when they passed the local option act.

“Chief Justice Beatty must have had in mind the fact that there is a distinction between a general election and a primary election when he said, in *Schostag v. Cator*, 151 Cal. 604, [91 Pac. 502]: ‘It is therefore as reasonable to require the elector to range himself with some particular party for the purpose of the primary election, as it is to require registration of all electors who desire to vote at the general election. By one registration is secured the right to vote at an election open to all registered voters; by the other is secured the right to vote at an election open to those only who belong to a particular party.’ Can it be possible that an election that is open only to a select coterie of voters instead of to ‘all the registered electors’ can be called a general election? Black, in defining ‘general,’ says: ‘Open or available to all; opposed to select; universal, not particularized; as opposed to special, obtaining commonly, or recognized universally; as opposed to particular; universal or unbounded; as opposed to limited.’ Here we have an election open only to a select, special, particular and limited number of voters, as opposed to a general election which is open to all.

“Is this presidential primary act an election at all in the sense of a general election, and if it is what officers are elected, and to what office? In a general election it must be true that all of the voters can vote for anyone whom they desire for any office, and that all of the candidates on all of the tickets would be under one ballot. That is what makes it general as opposed to special. But in this presidential primary we find but a part of the voters able to vote at all, and each voter ticketed and confined to the ballot of one party. . . .

"For the foregoing reasons I am entirely satisfied that the presidential primary election to be held on May 14, 1912, is not a general election as contemplated by section 6 of the local option act, and that the writ of mandate should issue as prayed for by plaintiff."

The direct primary law, by its designation, by the definitions found in section 1, as well as by its distinguishing characteristics, would seem to be placed out of the category of general elections. The only election denominated a general election by law is the election occurring biennially the first Tuesday after the first Monday of November. (Pol. Code, sec. 1041.) Special elections are defined by section 1043 of the same code. (*Kenfield v. Irwin*, 52 Cal. 164; *People v. Col*, 132 Cal. 334, [64 Pac. 477].) We have no statutory definition of a primary election except as found in subdivision 1 of section 1 of the act, and there we have the words "primary election" merely construed as referring to "any and every primary nominating election provided for by this act." Subdivision 5 of section 1 defines the words "political party" to be an organization "of electors which at the last general election before the holding of the primary election, polled at least three per cent of the entire vote of the state or of the county, city and county, district, or other political division for which nominations are to be made." Here we have, as well as in subdivision 3, the general election distinguished from the primary election. It is too much to say that a primary election "is no election at all," as some of the cases hold and as contended by respondent. Like any other election, it is the act of choosing a person for the performance of some office or duty and may be even by show of hands. In a sense, too, it is general, for it relates to the whole state geographically. But in its operation it is far from embracing the entire electorate.

In the sense of the elections held in November to choose officers to serve the state, it falls short of measuring up to what is commonly understood by a general election or what we think our law regards as a general election. In *Kenfield v. Irwin*, 52 Cal. 164, it was pointed out that the time for holding general elections is fixed by the statute, and hence no proclamation is necessary, but that the time at which special elections were to be held must be previously designated, with-

out which being done the election would be void. It is urged that the primary election law requires no proclamation of the election and fixes the time at which primary elections are to be held, and hence gives to them the character of a general election. The "presidential primary act," so denominated, fixes the time for the first election on May 14, 1912, "and on the second Tuesday in May of every fourth year thereafter." (Stats. 1911 [Extra Sessions], p. 85.) But we do not think that these elections must be held to be general elections because a time is fixed by law for holding them. That is an element entering into the true definition, but it is not in itself enough. To be general in the true sense and in the sense employed by the legislature the election must be one where every qualified voter of the state or district or division of the state, where required by law to be held, shall have the right to cast his ballot for whomsoever he pleases. The general election law gives this right, but the primary election law not only places limitations upon its exercise but withholds it altogether in some instances. The term "election" was held, in *Wickersham v. Brittan*, 93 Cal. 34, [15 L. R. A. 106, 29 Pac. 51, 28 Pac. 792], to carry "with it the idea of a choice, in which all who are affected with the choice participate," thereby distinguishing between an election and an appointment. If this be true, it must follow that a *general* election carries with it the idea of a choice in which all the electors who are affected participate. Here we have lacking this indispensable requisite of a general election. In fact, the May primaries do not make the selection of candidates, but they merely give an expression of preference of certain electors, by no means all of them, for their candidates for the presidency. Appellants cite numerous cases showing the distinction between general and special elections, but they do not aid in classifying primary elections, which are of recent origin and designed to meet the demand for a reform method of nominating candidates for office. Appellants cite *Marsden v. Herlocker*, 48 Or. 93, [120 Am. St. Rep. 786, 85 Pac. 329], where it is said: "If, by operation of law, the election invariably occurs at stated intervals, without any superinducing cause, except the efflux of time, the election is general." The court was discussing the distinction between general and special elections with reference to the necessity for giving notice of the election by proclama-

tion or otherwise. It said: "The reason for this rule [i. e., dispensing with notice where the time for holding the election is fixed by law] rests upon the doctrine that suffrage is a valuable civil right, to the exercise of which each qualified person is entitled, and he must be given or charged with notice as to when, where, and for what purpose he is to vote." Then follows the statement quoted in appellants' brief. The Oregon act casts upon the county court the duty of ordering "an election to be held at the time mentioned in such petition." All qualified voters could vote at said election and its time being fixed by the county court the opinion spoke of the election as general, but appellants did not complete the paragraph in which, continuing, the court said: "In which case all qualified persons are presumed to have knowledge thereof, and hence the failure of any officer or person upon whom the duty devolves to give a prescribed notice does not invalidate the votes cast thereat." The case throws no light on the question here.

If we were to hold that the primary election law may respond to the numerous statutes where the terms "general election" or "next general election" are used, it would introduce great confusion in our laws, for it will be found that in many statutes the "general election" is mentioned as determining when some act is to be done or some event is to transpire. By the Political Code one definite time has been fixed as answering to these terms, and we think we are unwarranted in holding that the legislature has established a new rule as to what constitutes a general election when referred to in those terms. The case of *Socialist Party v. Uhl*, 155 Cal. 776, 788, [103 Pac. 181], is cited and reliance is placed upon the statement in the opinion: "It is obvious from its terms that the law which the legislature was called upon to enact was a law applying to general elections." It certainly does apply to general elections as a sort of forerunner and preparatory step, but this does not imply, and the case did not require the court to decide whether or not the primary election is a general election in the sense used in the local option law. Some force to the argument of counsel for appellants is claimed from expressions in the opinion in *Spear v. Baker*, 120 Cal. 370, 378, [41 L. R. A. 196, 52 Pac. 659]: "The legislature, believing a sound public policy demanded such a course, has made these

elections a state institution. By the whole tenor of the act they are placed upon the same plane of the state elections, and in the consideration of the law bearing upon them must be so recognized." The law was held to be unconstitutional, because of its state wide application and its inherent violations of constitutional rights as the constitution then stood. Since then the constitution has been amended and primary elections are now sustained. But a primary law may "apply to general elections," as was said in the Spier case and is now insisted as true, and yet not be a "general election" law as contemplated by the legislature in so using the terms in the local option law.

Appellants have ably presented the argument in support of their contention, but its force, strong as it is, fails to shake our convictions.

The order is affirmed. *Remittitur* forthwith.

Hart, J., and Burnett, J., concurred.

[Civ. No. 930. Third Appellate District.—April 23, 1912.]

REBECCA E. DAVIDSON, Respondent, v. ALL PERSONS, etc., Defendants; ISABELLE DAVIDSON, Administratrix of the Estate of HALLIE B. DAVIDSON, Deceased, Appellant.

ACTION TO QUIET TITLE UNDER McENERNEY ACT—MOTION TO VACATE JUDGMENT BY DEFAULT UNDER SECTION 473—ADVERSE CLAIMANT NOT SERVED—TITLE NOT DERAIGNED.—Where a motion to vacate a judgment by default rendered under the McEnerney act of 1906 (Stats. 1906, p. 78), quieting title to four lots, is based upon an affidavit otherwise sufficient under section 473 of the Code of Civil Procedure, to entitle the mover to the relief asked on the ground that the plaintiff knew when the action was commenced that a defendant, now deceased and represented by an administratrix, was a half owner of three of said lots and the whole owner of lot 4 thereof, it is not a ground of objection to such affidavit, as distinguished from a proposed answer, that it does not state the source of the claimant's title.

ID.—EFFECT OF LIS PENDENS UNDER McENERNEY ACT—SHOWING REQUIRED TO VACATE DECREE—ADVERSE INTEREST AT COMMENCEMENT OF ACTION.—The notice of *lis pendens* required to be filed under the McEnerney act must be deemed to apply to all defendants named or not named. It follows that a defendant not named therein seeking relief from the judgment under section 473 of the Code of Civil Procedure must show that he had some interest in the property involved in the action at the time of the commencement of the action adverse to that asserted by the plaintiff.

ID.—SUFFICIENT SHOWING OF "VALID ADVERSE INTEREST"—"OWNERSHIP."—Under section 473 of the Code of Civil Procedure, it is sufficient that the affidavit shall state facts sufficient to show that the claimant had a "valid adverse interest" in the property involved in the action when it was begun. An allegation of "adverse interest" must necessarily result from an allegation of "ownership" known to exist by the plaintiff when the action was commenced.

ID.—FALSE AFFIDAVIT OF PLAINTIFF—FINDINGS AND DECREE NOT CONCLUSIVE.—Section 5 of the act expressly requires the plaintiff to make affidavit "that he does not know and has never been informed of any other person who claims or may claim any interest in . . . the property adversely to him," and if he discloses the name of such person, the summons shall be personally served upon such person, if he can be found in the state, with a copy of the complaint and affidavit. The findings and decree should not be held to be conclusive of the truth of such affidavit if shown to be false and fraudulent, as against a party not served with summons who asks relief under section 473, and directly and unequivocally states that plaintiff knew at the commencement of the action, and when he took his decree, that the claimant had an interest in the property.

ID.—STIPULATED ANSWER PROPOSED TO BE FILED AT TIME OF MOTION.—Where the parties have stipulated that a verified answer set forth was proposed to be filed at the time of the motion, which distinctly presents issues of fact as to the ownership of the property, setting forth the nature and source of the title claimed to have been in appellant's intestate prior to the commencement of the action, while it is not made part of the record of the motion, the trial court, since it was proposed to be filed, might well have considered it under the circumstances, and should have given it its proper weight in determining the motion.

ID.—RELIEF TO BE GRANTED TO LEGAL REPRESENTATIVE OF DECEASED DEFENDANT.—Section 473 of the Code of Civil Procedure expressly extends to the legal representative of a deceased defendant the right "to answer to the merits of the action," and a similar right of substitution is involved in section 1583 of the same code.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to vacate a judgment by default. Geo. H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Henry C. Schaertzer, for Appellant.

Stafford & Stafford, H. I. Stafford, and W. P. Caabu, for Respondent.

CHIPMAN, P. J.—Action to quiet title to certain lots in the city and county of San Francisco, under the so-called McEnerney act (Stats. 1906, p. 78). The complaint describes four separate lots.

The summons was served by publication, as provided for in the said act. It does not appear that personal service was made on any defendant, and the judgment recites that no appearance was "made by any defendant"; and "proof having been adduced of all the facts alleged in the complaint and other papers and pleadings on file herein, . . . it is hereby ordered, adjudged and decreed that said plaintiff . . . is the owner in fee simple absolute and in the actual and peaceable possession of the real property hereinafter described, and the whole thereof; that no other person has any interest . . . in or to said real property . . . and that her title thereto be, and the same is hereby established and quieted as against all the world." This judgment was entered and filed on October 27, 1909.

On October 15, 1910, appellant served and filed her notice of motion for an order setting aside said judgment, "based upon all the files, records and papers on file in said matter, upon this notice of motion, and upon the affidavit of Isabelle Davidson, administratrix of the estate of Hallie B. Davidson, deceased."

The affidavit of appellant alleges the death of Hallie B. Davidson to have occurred on December 4, 1909, less than two months after entry of said judgment; her appointment, duly made, as administratrix of his estate, on June 29, 1910, and, as to the interest of said deceased in said lots, states as follows: "That said Hallie B. Davidson, deceased, had an in-

terest in the property hereinafter described at the time of his death and at the time the judgment hereinafter mentioned was rendered in the above-entitled action and still continued to so have said interest in the said property hereinafter described, and that said interest in said hereinafter described property was a half interest in the property described in paragraphs 1, 2 and 3, and that as to the lot described under paragraph marked IV was and is a sole interest, and that he was the sole and only owner of said lot described herein as number IV, all of which facts were fully known to the said plaintiff at the time of the commencement of the above-entitled action, and also at the time said action was heard by said superior court of the state of California, in and for the city and county of San Francisco, and at the time the decree hereinafter mentioned was entered by the above-mentioned court." Then follow certain recitals in said decree, not now material, and concluding as follows:

"That the facts stated in the said decree are not true; that the said Rebecca E. Davidson is not the sole and only owner, nor has she any further or greater interest in any part or parcel of said property than a one-half interest in lots set forth and described as Nos. 1, 2 and 3, and that said Rebecca E. Davidson knew at the date of the said judgment and decree that she had no further or greater interest therein than a one-half interest in said lots and no interest whatever in the lot described herein as Lot No. 4.

"That no personal service of summons in the above-entitled action was ever made on Hallie B. Davidson, deceased, and the said Hallie B. Davidson was never personally served with the summons issued in the above-entitled action.

"That the said Rebecca E. Davidson knew at the time of the commencement of said action that the said Hallie B. Davidson claimed an interest in all of the said property hereinabove mentioned, and that he, the said Hallie B. Davidson, was a party in interest in said property, and that he claimed a portion and certain parts of said property as his sole and exclusive property.

"That your affiant has stated all the facts in relation to this matter to her counsel, and has fully and fairly stated to him each and every and all of the matters and things and facts relating thereto, and after such statement her counsel has ad-

vised her that she has a good and meritorious defense to the above-entitled action."

The appeal is from the order denying the motion to vacate and set aside the default judgment. Among the remedial sources of relief which may be resorted to that justice may be furthered, section 473, Code of Civil Procedure, provides as follows: "When from any cause the summons in an action has not been personally served on the defendant the court may allow, on such terms as may be just, such defendant or his legal representative at any time within one year after the rendition of any judgment in such action to answer to the merits of the original action."

Gray v. Lawlor, 151 Cal. 352, [12 Ann. Cas. 990, 90 Pac. 691], was a case arising under the McEnerney act, where the defendant petitioned to have the default judgment set aside under this section. One of the questions there was the same as the principal question here, namely: Does the affidavit show that the defendant has a good defense to the action on its merits? Said the court: "From the fact that the relief to be afforded is the privilege of answering 'to the merits of the original action,' the condition is implied that the defendant must have a good defense to the action on its merits. This being one of the conditions of the statute, the defendant must show that such defense exists. The defendant in this case has complied with this rule. He avers in his affidavit that he is now, and at all times mentioned for more than ten years last past has been, the owner of and entitled to the possession of the property described in the complaint. This, if true, is a complete defense to the cause of action sued on." We have examined the affidavit filed in that case and find that the defendant made no attempt in his affidavit to deraign title or give its source. All that he deposed to on that subject is stated in the opinion of the court in the language of the affidavit. And, apparently, the averment as to ownership of the property was in itself deemed a sufficient compliance with section 473, and not only justified but required the vacation of the default judgment. There were some averments in the affidavit as to the long-continued residence of the defendant in the city and county of San Francisco and to his being well known there and that his name was in the city directory, but these facts seem not to have influenced the decision. Re-

spondent contends that the affidavit in the present case was insufficient because it does not state the source of the title claimed to have been in Hallie B. Davidson; that the affidavit should show at least the facts required to appear in plaintiff's affidavit. This may be true of the answer, but the affidavit on this motion is not made under the McEnerney act, but under section 473 of the Code of Civil Procedure, and, if something more than appeared in *Gray v. Lawlor* is to be required in the affidavit, the rule must come from the court that decided that case. Respondent cites *Hoffman v. Superior Court*, 151 Cal. 386, [90 Pac. 939], where the court, referring to section 473, stated that the defendant must show facts "constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property." And it is hence claimed that the affidavit was insufficient. The two cases cited were decided about the same time—*Hoffman v. Superior Court* following *Gray v. Lawlor*—and the earlier case is cited as authority for the statement found in the later case. We discover nothing in the Hoffman case inconsistent with or changing the rule stated in *Gray v. Lawlor*. A "valid adverse interest" must necessarily result from an allegation of ownership.

Section 11 of the act provides that the judgment rendered in all such actions "shall be binding and conclusive upon every person who, at the commencement of the action, had or claims an interest, right, title or estate in and to said property or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." Respondent makes the point that the affidavit fails to state that defendant's intestate had any interest in the property at the commencement of the action. A *lis pendens* was filed with the complaint, the effect of which was to impart constructive notice of the pendency of the action to subsequent purchasers and encumbrancers, but, as the section provides, "only of its pendency as against parties designated by their real names." (Code Civ. Proc., sec. 409; see, also, secs. 479, 1908.) Section 9 of the McEnerney act requires a notice of the pendency of the action to be filed "at the time of filing the complaint," but does not state its effect. It must be assumed, we think, that the legislature intended the notice to be the notice referred to in section 409 and that the same effect

is to be given to it as in other cases where it may properly be filed. It is true that the defendants were not "designated by their real names," nor was anyone so designated. But the very exigency which gave rise to the act required that all persons having any interest in the property should be made defendants by the general designation of "All Persons," etc., and, being thus designated, the court acquired jurisdiction of the person upon publication of the summons. Unless it be held that all persons having or claiming to have an interest in the property are subject to the operation of the notice of the pendency of the action, any person, not designated by his real name, could assert an interest acquired a day short of a year after judgment, and, under section 473, have the judgment vacated, and the provisions of the statute that the judgment shall be binding and conclusive upon every person who at the commencement of the action had or claimed any estate or interest in the property, would be shorn of all their force. Indeed, appellant contends that "Hallie B. Davidson, whom the affidavit shows to have had his interest at the time of the rendition of the judgment, could have acquired that interest subsequently even to the rendition of the judgment from one of the defendants who was not personally served, and still have had a right to move for and obtain a vacation of the judgment." We cannot accept this view of the statute.

In the case of *Gray v. Laylor*, 151 Cal. 352, [12 Ann. Cas. 990, 90 Pac. 691], the plaintiff showed in his affidavit that he was the owner of the property at the commencement of the action and for some time prior thereto. The purpose of the act is to enable titles existing at the time the action is commenced to be quieted against the claims of all persons. That all persons claiming an interest in the property may be brought in by publication of summons, without personal service, and the title of the plaintiff conclusively decreed to be free from the claims of the whole world as of the date of the commencement of the action, has been settled by our supreme court. (*Title etc. Co. v. Kerrigan*, 150 Cal. 289, [119 Am. St. Rep. 199, 8 L. R. A., N. S., 682, 88 Pac. 363].) Speaking of the substituted service by which all persons are made defendants, the court said: "Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff and the relief sought, is posted upon

the property, and is published in a newspaper for two months, and a *lis pendens* containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns possible claimants, who are not known to plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected." It seems to us that we must, in order to preserve the integrity of the act, give to the *lis pendens* the same effect to all defendants, whether named or not named, and, doing so, a defendant, seeking relief under section 473, must show that he had some interest in the property at the commencement of the action, adverse to that asserted by the plaintiff.

Appellant claims that such an interest appears from her affidavit by necessary implication to have existed in her intestate. It is averred in the affidavit that appellant's intestate was the owner of a certain interest in the property at the time the judgment was rendered, "all of which facts were fully known to the said plaintiff at the time of the commencement of the above-entitled action, and also at the time the said action was heard by said superior court, . . . and at the time the decree hereinafter mentioned was entered by the above-entitled court." It is further averred: That plaintiff "knew at the time of the commencement of said action that the said Hallie B. Davidson claimed an interest in all of the said property hereinabove mentioned, and that he, the said Hallie B. Davidson, was a party in interest in said property, and that he claimed a portion and certain parts of said property as his sole and exclusive property." The implication contended for may not clearly appear, although there is some force in the suggestion that if plaintiff knew at the commencement of the action that Davidson had an interest in the property, he must then have claimed an interest therein. However this may be, it would seem to us unconscionable to deny the motion in view of the facts alleged. Section 5 of the act requires that the plaintiff shall make affidavit, "fully and explicitly setting forth and showing" certain facts, and, among them: "(3) That he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or, if he does know or has been informed of any such

person, then the name and address of such person"; and section 6 provides that, "if the said affidavit discloses the name of any person claiming an interest in, or lien upon, the property adverse to the plaintiff, the summons shall be personally served upon such person if he can be found in the state, together with a copy of the complaint and a copy of said affidavit." We do not think the findings and decree should be held to be conclusive of the truth of the affidavit as against a person not served who asks relief under section 473, and directly and unequivocally states in his affidavit that the plaintiff knew at the commencement of the action and when he took his decree that affiant had an interest in the property. It appears by the stipulation of the parties that "Isabelle Davidson, administratrix as aforesaid, submitted and placed in the hands of the court the hereunto attached answer, which she requested in said motion to be allowed to file." This answer is verified and distinctly presents issues of fact as to the ownership of said property, setting forth the source and nature of the title claimed to have been in appellant's intestate prior to the commencement of the action. The notice of the motion did not specifically refer to this answer, but it is in the record and was before the trial court when the motion was heard and appellant in her motion requested leave to file it. While strictly not made a part of the record on the motion, the learned trial court might well have so considered it, and, under the circumstances, we think should have given it its proper weight in determining the motion. But, irrespective of this consideration, we are clearly of the opinion that appellant presented facts sufficient to show that she had a good defense to the action on its merits and that her motion should have been granted.

Section 473 expressly extends to "the legal representative" of the defendant the right "to answer to the merits of the action." (See, also, Code Civ. Proc., sec. 1582.)

The order is reversed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 948. Third Appellate District.—April 23, 1912.]

THE PEOPLE OF THE STATE OF CALIFORNIA, by U. S. WEBB, Attorney General, etc., Plaintiff, v. THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY, a Corporation, et al., Respondents; ARTHUR CRANE, Petitioner, Appellant, and FRANK J. SYMMES, Receiver, Respondent.

INSOLVENT CORPORATION—PROCESS OF LIQUIDATION—RIGHT OF STOCKHOLDERS TO ASSIGN SHARES—RIGHT OF REGISTRY BY ASSIGNEE.—There appears to be no rule of law nor any reason which precludes an owner of stock in an insolvent corporation, which is in process of liquidation, from transferring the same to whomsoever he pleases. The law embodied in section 324 of the Civil Code expressly provides that shares of stock, to evidence which certificates are issued, constitute personal property, and may be transferred. Though shares of stock in an insolvent corporation may possess little, if any, intrinsic value, it is nevertheless property, and its transfer carries with it the rights that would accrue to the original owner thereof, and he has the right to be registered in the stock book of the corporation as the owner of the stock so transferred to him.

ID.—STOCKHOLDERS UNAFFECTED BY INJUNCTION AGAINST THE CORPORATION AND OFFICERS.—The stockholders of the corporation, as such, are unaffected by an injunction against the insolvent corporation and its officers to prevent the same from carrying on its business, and such injunction cannot preclude a transfer of stock therein by such stockholders or affect its validity, subject only to the individual liability of a stockholder for debts of the corporation contracted during his ownership of the stock.

ID.—REMEDY TO COMPEL ENTRY OF STOCK—PARTIES—CORPORATION—ENTRY BY RECEIVER—CUSTODY OF BOOKS.—The stockholder to whom the stock has been transferred may properly proceed to compel the entry of the stock upon the books of the corporation by making the corporation a party defendant, and there being no directors in charge of the corporation, they need not be made parties, and as the receiver is the legal custodian of all the books of the corporation, he may be made a party defendant, and commanded to make the proper entry of the transfer of the stock upon the books of the corporation.

APPEAL from an order of the Superior Court of the City and County of San Francisco dismissing an application for an order permitting or instructing the defendant corporation

or petitioner or the receiver of corporation to enter petitioner's name as a stockholder of record in the stock book of the defendant corporation. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

Arthur Crane, Appellant, *in pro. per.*

J. V. De Laveaga, and E. De Los Magee, for Receiver, Respondent.

U. S. Webb, Attorney General, for People, Plaintiff.

HART, J.—This is an appeal from an order denying and dismissing petitioner's application for an order permitting or instructing the defendant corporation or the petitioner or the receiver of said corporation to enter the petitioner's name "as a stockholder of record in the stock book of the defendant corporation."

The facts as shown by the petition may be summarized as follows:

That "The California Safe Deposit and Trust Company," a corporation, is "now in the course of liquidation and of judgment and decree" of the superior court in and for the city of San Francisco. On the twenty-ninth day of January, 1908, said court issued a "permanent injunction against the defendant corporation and the officers thereof, enjoining them from further carrying on the business for which the said corporation was organized," and at the same time appointed as receiver of said corporation one Edward J. Le Breton, who accepted said appointment, qualified as such receiver and entered upon the discharge of his duties as such, and took possession of all the books, papers, records and properties of said corporation. Le Breton continued to act as such receiver until the date of his death, which occurred on the nineteenth day of March, 1910. On the twenty-fourth day of March, 1910, said superior court, after due proceedings, appointed Frank J. Symmes as the successor of said Le Breton, and said Symmes has since then been, and is now, the receiver of said corporation.

The petition alleges that, "on or about September 20, 1909, the board of directors of said The California Safe Deposit and

Trust Company obtained permission of the said court to levy an assessment upon all of the capital stock of said corporation, on the representation and promise to the court that 'no one would buy in any of the stock which would be sold for the said assessment.' " It is alleged that in pursuance of the permission so obtained, an assessment of ten dollars per share was, on the twentieth day of December, 1909, levied by said corporation upon all the capital stock of said corporation; that the owners of said stock having defaulted in the payment of said assessment, an order was duly made by said corporation, on the eighth day of February, 1910, that the said stock of said corporation should be sold on March 10, 1910, to pay the assessment so made; that the assessment sale was duly advertised and regularly held at room No. 801, in the Kohl building, in said city and county of San Francisco, on said tenth day of March, 1910; that the petitioner attended said sale and bid the sum of \$50.25 for five shares of said stock, said sum representing the amount of said assessment and costs, and that "said five shares were thereupon knocked down, struck off, sold and delivered to the said plaintiff, the said plaintiff then and there paying the sum of \$50.25 to the said corporation." It is further alleged that the respective owners of the several shares so purchased by the petitioner each consented to and authorized the sale of said shares to the petitioner, and each signed and executed an assignment thereof to petitioner, and that by reason thereof the latter became and is the assignee by purchase of said shares of stock. It is alleged, upon information and belief, that the petitioner is the only stockholder of the defendant corporation now in existence; that all the directors and officers of the defendant corporation have disqualified themselves from holding office as such and have abandoned such offices as directors and officers; that the petitioner is the only person in existence entitled to act for the said corporation other than the receiver of said corporation, appointed by said court as heretofore explained.

The petitioner declares that, when he bid in and purchased said shares, he had no knowledge of the promise made to the court, at the time permission was thereby granted to levy the assessment referred to, that "no one would buy in any of the stock which would be sold for the said assessment."

It is alleged "that said receiver at all times since his said appointment has refused, and still refuses, to allow said petitioner, or the defendant corporation, to enter petitioner's name as a stockholder in the said books, or as sole stockholder, or to himself enter said name as a stockholder, although many times requested so to do."

A general and special demurrer was interposed to the petition, and, while there is no showing that the demurrer was directly passed upon, the order denying and dismissing the petition may be regarded as amounting to the same thing—that is, a ruling that the averments of the petition are not sufficient to entitle the petitioner to the relief prayed for.

The effect of the demurrer is, of course, to admit the truth of the allegations of the petition.

The respondent contends, in support of the order appealed from, that there are two reasons which justified the trial court in denying the relief asked for by the petition, viz.: (1) That the appellant was and is not a legal stockholder of the corporation, and (2) that, assuming that he is a legal stockholder, he cannot compel the receiver to enter his name as such stockholder on the books of the corporation.

The argument advanced in support of the first of the foregoing points is this: That the order authorizing or permitting the directors to levy an assessment on the stock of the corporation was made after the time within which an appeal might have been taken from the order granting the injunction enjoining the directors from further transacting or conducting any of the business of said corporation; that the judgment entered upon the order granting the injunction had, therefore, become permanent before the making of the order permitting the assessment of the stock by the directors, and that the court was consequently without jurisdiction to make the latter order, or, as counsel put the proposition, "the lower court had no power to modify or set aside this permanent injunction to permit the directors of the California Safe Deposit and Trust Company to levy an assessment." It is, therefore, contended that both the assessment and the sale were absolutely void, and that the petitioner thus legally acquired no stock in the corporation.

The contention with respect to the second point is that the receiver is without authority to enter the petitioner's name in

the books of the corporation as a stockholder, as such act would be in excess of his powers as such receiver.

We do not conceive it to be necessary, in our view of the main question submitted for decision, to pass upon the proposition whether the effect of the court's order permitting the board of directors to levy an assessment upon the stock was to *modify* the injunction referred to or whether the action of the court thus complained of merely involved an act, consistent with the injunction, designed to facilitate the liquidation or the winding up of the affairs of the corporation to the best interests of the depositors, creditors, shareholders, etc. It may be suggested, however, that an injunction in such case is, as a rule, merely an ancillary or incidental remedy in aid of the purposes of liquidation, and is usually directed solely against the misuse or misappropriation of the property and assets of the corporation and to prevent the doing of any new business by the directors or officers *with the public* for the corporation. But, however that may be, we do not, as stated, intend to decide that question here, because we do not think it necessary to a decision in this case to do so.

We have been aided very little by counsel in reaching a conclusion in this case. While counsel for the appellant has cited a long list of cases which he insists sustain his position that it was the duty of the court to compel the receiver to register his name in the stock book as a stockholder of the corporation, counsel for the respondent have contented themselves with the treatment of their positions on the several questions presented here as *obviously* sound, and have distinguished the cases cited by appellant from the case at bar by the declaration in effect that they *obviously* apply to "going corporations" only, or corporations not in course of liquidation, and not, therefore, to insolvent corporations *in custodia legis*. In short, counsel for respondent have neither cited authorities, if any on the points involved are available, nor advanced any argument in support of their bald statement that their contentions are right and that the cases referred to by appellant have no application to the facts of this case.

We have very often found it to be true—at least, it has been so found by the writer—that among the most troublesome tasks imposed upon reviewing tribunals are those involved in those cases in which the attorneys concerned conceive the

propositions contended for by them to be so *obvious* as to require neither the citation of authorities, if any are to be had, nor the presentation of argument to support them. There may be sound legal reasons why the court below, under the circumstances which are disclosed by the petition, should not allow the name of the petitioner to be registered in the corporation books as a stockholder, but if so, those reasons have not been presented in the briefs and argument here.

It may be conceded, for the purposes of this case, that, under the order of the court permitting the assessment of the stock of the corporation, the sale of said stock for the purpose of enforcing payment of the assessment so levied was void, and that the petitioner, therefore, did not acquire a legal or any title to said stock by reason of such sale. But the petitioner does not rely alone upon the title, if any, thus acquired to the stock referred to in his petition. He alleges that, in addition to buying said stock at said assessment sale, he acquired title thereto by the assignment thereof to him by the owners of said stock.

We have been shown neither any rule of law nor any reason which precludes an owner of stock in an insolvent corporation in process of liquidation from transferring the same to whomsoever he pleases. The law provides that shares of stock in a corporation, to evidence which certificates are issued, constitute personal property and may be transferred. (Civ. Code, sec. 324.) Stock in such corporation may possess little, if any, intrinsic value, but it is, nevertheless, property, and its transfer carries with it whatever rights that would accrue to the original owner thereof. Having purchased the stock of the owners thereof in the corporation involved here and thereby become entitled to whatever rights accompanied such ownership, we can at the present time conceive of no reason why the petitioner should not be registered in the stock book of the corporation as the owner of the stock so transferred to him and, therefore, as a stockholder in the concern.

There is nothing in the averments of the petition indicating that the stockholders were placed under the ban of the injunction referred to in said petition. The stockholders cannot be held to have become any less the owners of their stock or any less stockholders in the corporation simply because of the proceedings in liquidation, nor is their power or right to dispose

of it, if they choose to do so, destroyed or impaired or curtailed in the slightest measure for that reason. Of course, the sale of stock by a stockholder would under no circumstances release his personal or individual liability for his proper proportion of all its debts and liabilities contracted or incurred *during the time he was a stockholder* (Const., art. XII, sec. 3; Civ. Code, sec. 322), but, as stated, his stock is *property* which he may sell or transfer at any time or under any circumstances, so long as he is not prevented from doing so by some legal process or proceeding, involving either his rights as to such stock or the rights generally of the corporation.

But respondent contends that this proceeding should have been brought against the directors of the corporation and not against the receiver, for the reason, as before stated, that it is not within the duties or powers of the last-named officer to register transfers of stock in the books of the corporation. The proceeding is directed against both the receiver and the corporation, and it is alleged that the receiver has in his possession all the books, papers, etc., of the corporation, and that he has refused, "and still refuses, to allow said petitioner, or *the defendant corporation*, to enter petitioner's name as a stockholder in the said books," etc. This allegation necessarily implies that the *corporation* is willing and ready to enter the name of the petitioner in the stock book as a stockholder if permitted to do so by the receiver who has sole possession of said book and all books of the corporation, and the relief asked is merely that an order be made allowing petitioner's name to be properly so registered in the proper book. The proceeding against the corporation is sufficient without making the directors parties thereto. The latter are mere agents of the corporation, and their acts as such are always those of the corporation. And, obviously, the latter can act only through its agents, and where a corporation is compelled to do some act which it is its legal duty to perform, it can perform that act only through its duly authorized agent or agents. Therefore, if the receiver is required by the order of the court to allow the *corporation* to enter the name of the petitioner in the stock book as a stockholder, it will follow that that act will be performed by those of its officers or any officer upon whom, under the circumstances, that duty must necessarily rest.

If it be true, as the petition alleges, that there are now no directors or officers of the corporation, then we can perceive no valid reason why the court should not require its receiver to perform the physical act of registering the name of the petitioner in the stock book as a stockholder by reason of his ownership of the stock mentioned in the petition. The corporation and its property and books are in the possession and control of the receiver for the court, and the receiver may, among other things, do and perform any acts respecting the property of the corporation that the court may authorize. (Code Civ. Proc., sec. 568.) At any rate, as we have declared, we are satisfied that the petitioner is entitled to have the evidence of his ownership of the stock described in the petition and of his corresponding rights as a stockholder of the corporation, whatever such rights may amount to, duly and properly preserved in the book of the corporation maintained for such purpose.

The order is reversed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 968. Third Appellate District.—April 23, 1912.]

G. A. EDINGTON, Petitioner, v. SUPERIOR COURT OF
YOLO COUNTY, Respondent; N. A. HAWKINS,
Judge.

CRIMINAL LAW—SUFFICIENCY OF INFORMATION—CONTRIBUTING TO DELINQUENCY OF DEPENDENT FEMALE CHILD.—An information charging that the defendant contributed to the delinquency of a dependent female child of the age of about sixteen years, which alleges that she was "then and there a female dependent minor child in this, that 'she' had no parents or guardians willing and capable of exercising proper mental control over" her, and that "her home" was and is, by reason of neglect on the part of her guardian, an unfit place for "her," and that "she was in danger of growing up to lead an idle, dissolute and immoral life," states facts from which the conclusion necessarily follows, under the juvenile court law (Stats. 1911, p. 626), that the female child was a "dependent per-

son." It need not state that she was adjudged to be such, unless an adjudication is relied upon; otherwise the facts must be stated.

ID.—MODES OF PROSECUTION OF OFFENSE.—Though the juvenile court law contemplates an information without any preliminary examination, a preliminary examination prior to an information filed thereunder by the district attorney may be treated as surplusage. It is sufficient that the superior court exercising the functions of a juvenile court has jurisdiction over the offense. If it be admitted that the prosecution should be entitled in the juvenile court, instead of in the superior court, the failure to do so is a mere irregularity not affecting the jurisdiction of the court. It is sufficient that it shows a prosecution under the juvenile court law.

ID.—REFUSAL OF WRIT OF PROHIBITION.—A writ of prohibition will not be granted to restrain the superior court from trying an offense under the juvenile court law, under an information filed by the district attorney after a preliminary examination before a magistrate.

APPLICATION for writ of prohibition to the Superior Court of Yolo County. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

R. Clark, for Petitioner.

A. G. Bailey, District Attorney, for Respondent.

BURNETT, J.—This is an application for a writ of prohibition to restrain the superior court of Yolo county and Honorable N. A. Hawkins, the judge thereof, from trying petitioner on a charge of "causing, encouraging and contributing to the delinquency of a dependent and delinquent child." A preliminary examination of the charge was held in the justice court of Woodland township in said county and the defendant was held to answer to the superior court. Therein an information was afterward filed by the district attorney and a motion to set it aside and a demurrer were interposed by defendant. In both these matters the ruling of the court was in favor of the people and the case was set down for trial; hence this application.

There are two points made by petitioner that we deem worthy of consideration. The first is that the information is totally insufficient as a basis for the prosecution, in that it does not appear therein that the complaining witness had

been previously adjudged a dependent child. The prosecution, it may be said, is under section 26 of what is known as the juvenile court law (Stats. 1911, p. 672), providing that "In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having the custody of such person or any other person who shall, by any act or omission, encourage, cause or contribute to the dependency or delinquency of such person, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year or both such fine and imprisonment and the juvenile court shall have jurisdiction of all such misdemeanors." Section 1 of said act defines "a dependent person," and therein is found a catalogue of sixteen different conditions according to which a person may be classified as "dependent." As far as is necessary to quote herein, the said section provides that "The words 'dependent person' shall mean any person under the age of twenty-one years . . . 5. Who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control . . . or 16. Who from any cause is in danger of growing up to lead an idle, dissolute, or immoral life." Turning to the information herein, we find the allegation in reference to the complaining witness that, at the time the offense was committed, she being "then and there a female child, under the age of eighteen years, to wit, of the age of sixteen years or thereabouts, was then and there a female dependent minor child in this, that the said Hazel Douglass had no parents or guardians, willing and capable of exercising proper parental control over the said Hazel Douglass, and that the home of said Hazel Douglass was and is, by reason of neglect on the part of her guardian, an unfit place for the said Hazel Douglass and that the said Hazel Douglass was and is in danger of growing up to lead an idle, dissolute and immoral life." It is thus to be seen that from the facts alleged the conclusion necessarily follows, under the definition given by the said statute, that the said Hazel Douglass was a "dependent person." We have found nothing in the law which requires that her status as such should be adjudicated prior to the prosecution of another person for contributing to her dependency,

and we see no reason why, if properly alleged, the facts bringing her within said class may not be established at the trial of the defendant as other facts are shown tending to prove the charge. The principle would be the same if the defendant were accused of a crime against a minor or insane person. In such case no prior adjudication of the minority or insanity would be required, but, of course, the burden would be on the prosecution to establish this as other material averments of the crime. This view is entirely consistent with and is supported by the decision in *People v. Pierro*, 17 Cal. App. 741, [121 Pac. 689]. In that case the information was fatally defective, for the reason that facts were not alleged bringing the child within the definition of a "dependent," the district attorney contenting himself with the averment that she "was a minor female child under the age of eighteen years, and was then and there a dependent child within the meaning of that certain act," etc. The second district court of appeal very properly held, as stated by Mr. Justice James, that "Defendant was entitled to have the information show the particulars in this regard, for he was called upon to meet the issue, first, as to whether the child had in fact become a delinquent. . . . Had the child against whom the offense is alleged to have been committed been adjudicated to be a dependent child, then it would have been sufficient to plead such adjudication; but when no adjudication is relied upon as showing a legal determination made of the character of the minor, the facts which make such minor a dependent must be pleaded in the information."

The other contention of petitioner is that the said juvenile court law contemplates that no preliminary examination shall be held, but that the defendant must be "prosecuted on a complaint filed in the juvenile court charging him with the misdemeanor mentioned in the act and trying him for such misdemeanor in the juvenile court, without any examination or the filing of any information." In addition to the clause already quoted as to the jurisdiction of said court, attention is called to the amendment to section 682 of the Penal Code, approved February 21, 1911 (Stats. 1911, p. 68), providing that "Every public offense must be prosecuted by indictment or information, except . . . 4. All misdemeanors of which jurisdiction has been conferred upon superior courts sitting

as juvenile courts." The word "information" in this amendment is obviously used in a technical sense and refers to the accusation filed after a preliminary examination. It is admitted by petitioner that no procedure is provided in said juvenile act for the prosecution of defendant for the crime charged, but it is contended that "Where power is given a court to do a thing, that it may adopt any lawful method to carry that power into effect, and that when no method is provided by law, it can adopt any suitable method." This is in accordance with the provision of section 187 of the Code of Civil Procedure that "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." But, as we view it, this concession yields the point as far as this application is concerned. It may be admitted that the preliminary examination was not required and it may be treated as a nullity, but we still have this situation: The superior court has jurisdiction to try the offense charged. The said "juvenile court law" is declared in its title to be an act providing, among other things, "for the punishment of persons responsible for, or contributing to, the dependency or delinquency of children, and giving to the superior court jurisdiction of such offenses." It is true that the court is known as the "juvenile court," but it is unquestionably the superior court, exercising jurisdiction over a peculiar class of offenses. There is, furthermore, no question that the defendant is charged in apt language with an offense defined in said law and within the jurisdiction of said court. The only objection of any moment is to the form of procedure, but there is nothing in the statute, confessedly, to preclude the district attorney from making the technical accusation against the defendant in the form of an information. It contains every element of a sufficient complaint; by his signature the prosecuting officer of the court has given it his sanction and the defendant's right to a fair trial has not been impaired. It is not verified, but verification is required only of the complaint filed in a justice or police court.

(Pen. Code, sec. 1426.) If it be admitted that the prosecution should be entitled in the "Juvenile Court" instead of the "Superior Court," it is sufficient to say that this is a mere irregularity, and does not affect the jurisdiction of the court. It does, however, appear in the information, as we have already suggested, that the prosecution is undertaken in the superior court acting under the provisions of said juvenile court law and as contemplated by its terms.

We think it cannot be said that there is shown to be such lack of authority in the court to try the cause as to justify the issuance of the writ. We need not, therefore, consider the question whether there is a plain, speedy and adequate remedy by appeal.

The order to show cause is discharged and the writ denied.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 23, 1912, and the following opinion then rendered thereon:

THE COURT.—We have carefully examined the points made in the petition for a rehearing of this matter but find no reason for changing our views expressed in the opinion filed herein on April 23, 1912. The rehearing is therefore denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 22, 1912.

[Civ. No. 921. Third Appellate District.—April 24, 1912.]

**ROBERT A. CHURCH, Appellant, v. JOHN COLLINS,
Respondent.**

ACTION FOR DAMAGES FOR BREACH OF CONTRACT TO SELL LAND—LIMITED AUTHORITY OF BROKERS—CAUSE OF ACTION NOT STATED—GENERAL DEMURRER.—A complaint in an action for damages for breach of a contract to sell land, purporting to be signed by real estate brokers, in the name of the vendor, and which sets forth their contract of employment by the vendor, defendant, which merely shows that they were employed to negotiate a sale, at an agreed price, for a specified commission, reserving to the vendor the right to sell the property, and agreeing to pay two per cent commission in case of sale, and which contained no express authority to the brokers to make a binding contract of sale, states no cause of action, and a general demurrer thereto was properly sustained.

ID.—SETTLED RULE AS TO AUTHORITY OF BROKERS—POWER TO EXECUTE CONTRACT MUST BE FREE FROM DOUBT.—Under the code provisions, and the settled authorities with regard to the power or right of brokers, as agents of the owner of land, to execute a contract of sale for such owner, the settled rule is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such was its purpose. The ordinary authority of a real estate agent is to find a purchaser, and he has no power to bind his principal by a contract, unless it was intended to confer such additional authority.

ID.—GENERAL TENOR OF AGREEMENT IN QUESTION—NULLITY OF ACTION OF BROKERS.—It is held that the general tenor of the whole agreement in question clearly shows an intention on the part of the owner to limit the authority of the brokers merely to the procurement of a purchaser ready, willing and able to buy the same, and not to confer upon the broker the right or power to execute for him a contract of sale; and that any act on the part of the brokers, beyond the authority conferred, was a nullity, so far as any effect it was designed to have on the owner was concerned.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

L. G. Scott, for Appellant.

H. W. A. Weske, and Jos. P. Berry, for Respondent.

HART, J.—The plaintiff brought this action to recover damages for the breach of an alleged agreement for the sale of certain real property.

A general demurrer to the complaint was sustained, and this appeal is by the plaintiff from the judgment entered after and upon the order sustaining the demurrer.

It appears that, on January 17, 1911, the defendant and the firm of Lyman & Briggs, real estate brokers at Sebastopol, in Sonoma county, entered into a written agreement by the terms of which the former constituted the latter as his agents for the sale of the property described in said agreement. Acting under what they conceived to be authority so to do as conferred upon them by said agreement, Lyman & Briggs, on the ninth day of May, 1911, for the defendant, entered into a written contract with the plaintiff for the sale of said property to the latter, and the main question arising upon said transactions and presented here is whether said real estate brokers were authorized or empowered by their agreement with the defendant to make such or any contract, for the latter, for the sale of said property.

Although the defendant addresses some criticism to the complaint generally, his principal contention seems to be that his agreement with Lyman & Briggs merely conferred upon them the right, exercisable for a limited period and for specified compensation, to secure for him a purchaser of said property ready, willing and able to buy the property on the terms embodied in said agreement, and, having obtained such a purchaser, their authority as thus established or conferred was completely exhausted.

Upon the construction of the agreement between the defendant and the real estate brokers, it is manifest the decision of this question must depend.

The parts of the agreement between the defendant and the real estate brokers important or necessary to the consideration of the question as to the extent of the authority thereby vested in the latter read as follows:

“In consideration of their efforts to sell the within described property, I hereby appoint Lyman & Briggs, of Sebastopol, California, to act as agents for the sale of said prop-

erty for the sum of \$6,000.00, and I agree not to offer the same for a less price before the expiration of this contract without the consent of said parties. . . . It is further agreed that any deposit which may be paid on the purchase price of said property shall be paid to Lyman & Briggs, and in the event of forfeiture by the purchaser one-half of said deposit shall be paid to me, and the remaining one-half shall be retained by said agents in consideration of their services. This agreement shall be binding on me for a period of six (6) months from the date hereof and thereafter until canceled by a written notice of at least ten days. If sale is made within ninety days after the legal expiration of this contract, by or through me, to anyone to whom said property has been submitted by said agents during the term of this agreement, I agree to pay said agents a commission of 2 per cent on sale price. I reserve the right to sell said property myself, or to sell said property through the agency of anyone else, but I hereby agree that in case such sale be made by myself, or through any other agency, in consideration of their services to pay said Lyman & Briggs a commission of two (2) per cent on sale price."

The contract of sale entered into between the brokers and the plaintiff contained, substantially, the terms upon which the defendant authorized the agents to sell the property. The only difference between the two as to the terms or conditions is purely technical as distinguished from substantial, but under our conception of the transactions it is not necessary in any event to notice the alleged variance as to the conditions of the sale between the two instruments.

At the time, however, of the execution of said contract of sale, the plaintiff deposited with Lyman & Briggs, as "earnest" money, or as a payment on the price at which the property was to be sold to him in the event of the consummation of the sale, the sum of \$230.

The agreement between the defendant and the real estate brokers and the contract of sale above referred to were annexed to and made a part of the complaint, as was also a letter, dated June 7, 1911, addressed by the plaintiff to the defendant, tendering a payment of \$3,000 in coin to the latter, offering to execute a mortgage for the remainder of the purchase price and demanding from the defendant a conveyance

of the property "free and clear from all liens and encumbrances."

We are of opinion that the agreement between the defendant and the real estate brokers conferred no authority upon the latter to execute a contract for the sale of the property involved here to the plaintiff or to any other party, and that, therefore, the court properly sustained the demurrer to the complaint.

An agreement authorizing or employing an agent or broker to sell real estate for compensation or a commission must be committed to writing (Civ. Code, sec. 1624, subd. 5; Code Civ. Proc., secs. 1971, 1973), and "an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." (Civ. Code, sec. 2309.)

The result of the foregoing provisions of our law is that an agent is without power to execute an agreement for the sale of real estate unless he is authorized by the principal, in writing, to execute such agreement for and in the latter's behalf.

The rule deduced from the authorities with regard to the power or right of agents to execute contracts of sale of real property for the owners thereof is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct and certain in its meaning to that end as to leave no room for doubting that such is its purpose. "The ordinary authority of a real estate agent deputed to sell real estate," says the supreme court in *Stemler v. Bass*, 153 Cal. 791, 795, [96 Pac. 809], "is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority." And it has often been held that the construction put upon the employment of brokers "to sell" or to "close a bargain" concerning real estate conferred no more than a mere authority upon the broker to find for the principal or owner of the property a purchaser at the price specified. (*Duffy v. Hobson*, 40 Cal. 241, 244, [6 Am. Rep. 617]; *Rutenberg v. Main*, 47 Cal. 213, 219.) Giving some of the reasons why the intention to confer authority upon a broker to sell the real estate of another should be manifested by the use of clear and distinct language, the court, in *Duffy v. Hobson*, 40 Cal. 241, [6 Am. Rep. 617], says: "A sale of real estate involves the adjustment of

many matters in addition to fixing the price at which the property is to be sold. . . . The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract even if the title prove satisfactory, and he may decline to bind himself to convey to such purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime have an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these considerations might, and usually do, arise in the mind of the vendor."

The only covenant or provision contained in the agreement between the defendant and Lyman & Briggs which could by any possibility be made to bear the construction that the former intended by said agreement to clothe the latter with power to enter into a contract for the sale of said property is that by which the brokers were in effect authorized to receive a deposit from a proposed purchaser; but, when considered in connection with other parts of the agreement, that provision cannot reasonably be so construed or held to import an intention in the vendor to confer such authority upon the brokers. The agreement, it will be noted, merely constitutes Lyman & Briggs as the agents of the defendant "for the sale" of the property therein described, and makes other provisions usual in such agreements with brokers whose employment is limited to the securing of a purchaser, ready, willing and able to purchase. For instance, it reserves to the owner the right "to sell said property"—that is, to find a purchaser—within the time within which the brokers are authorized "to sell" or find a purchaser, stipulating that in such case, if the proposed buyer has not previously had the matter submitted to him by the brokers, to pay the latter, nevertheless, two per cent on the purchase price. And the agreement contains a like provision as to compensation to the brokers in the event that the property is sold by the owner after the expiration of the time within which the brokers were authorized to procure a purchaser to a party to whom the proposition as to such sale has been previously submitted by said brokers.

In fine, the general tenor of the whole agreement is clearly demonstrative of an intention on the part of the owner to

limit the authority of the brokers merely to the procurement of a purchaser, or, to state the proposition the other way, not to confer upon the brokers the right or power to execute for him a contract of sale. Indeed, we can perceive no substantial distinction between the agreement here and the one involved in the case of *Armstrong v. Lowe*, 76 Cal. 616, [18 Pac. 758]. There the agreement read as follows: "You are hereby authorized to sell my property, and *receive deposit on same*, situated . . . , and described as follows: . . . , for the sum of two hundred dollars per acre, cash. I hereby agree to pay you the sum of five per cent for your services in case you effect a sale, or find a purchaser for the same, or will pay you two and a half per cent of above commission should I sell the same myself, or through another agent. This authority to remain in full force for the term of three months, or until canceled by," signed by the owner. The court held that that agreement did not confer upon the real estate brokers with whom it was made the authority to execute a contract to convey, citing in support of its conclusion *Duffy v. Hobson*, 40 Cal. 241, [6 Am. Rep. 617].

The case here is radically different from the case of *Bacon v. Davis*, 9 Cal. App. 84, [98 Pac. 71]. The agreement in that case expressly and specifically conferred upon the agent "the exclusive right to sell *for me, in my name* and receipt for deposit thereon" the land described in said agreement. After an exhaustive examination of the question whether the contract to convey executed by the agent was authorized by said agreement and binding on the principal, this court, referring to numerous authorities construing such agreements, held that the agent was vested by the agreement with plenary power to make the contract of sale, and that the contract was valid and binding on the owner of the property involved.

A comparison of the agreement in the case at bar with the one in the Bacon case will readily disclose a radical distinction between the two. Here there is no such authority given the brokers as is necessarily implied from the language in the Bacon agreement, "to sell *for me, in my name*"—language that can import nothing short of an intention in the vendor to bestow upon his agent the right and the power to execute in *his* (the vendor's) *name* a contract to convey.

But there is no necessity for prolonging the discussion. It is very clear to our minds that the limit of the authority the

defendant intended to confer upon Lyman & Briggs was to procure for him a purchaser of the property ready, willing and able to buy the same, and that consequently any act on their part relative to said property beyond such authority was a nullity, so far as any effect it was designed to have on the defendant was concerned.

The view thus taken of the transactions eventuating in this action renders it unnecessary to notice other less important points urged against the validity of the alleged contract of sale and the sufficiency of the complaint to state a cause of action.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 923. Third Appellate District.—April 25, 1912.]

**ANDREW J. PIERCY, as Administrator of the Estate of
MARY J. PIERCY, Deceased, Respondent, v. EDWARD
M. PIERCY, Appellant.**

ACTION TO SET ASIDE DEED FROM AGED MOTHER TO SON—UNDUE INFLUENCE—ABSENCE OF INDEPENDENT ADVICE—INCAPABILITY OF UNDERSTANDING—SUPPORT OF FINDINGS.—It is held, upon a review of the evidence in this action to set aside a deed from an aged mother to her son, on the ground of undue influence, that the findings that the deed was obtained by undue influence, and was not voluntarily delivered, and that by reason of her old age and mental weakness she was incapable of transacting or understanding business transactions in a thoroughly intelligent manner, and was particularly incapable of properly understanding the nature, effects and consequences of any act regarding the transfer of real property, without independent advice and careful explanation thereof, and that she had no independent advice, were properly sustained by the evidence.

ID.—CONFIDENTIAL RELATION BETWEEN SON AND MOTHER—INFERENCE OF UNDUE INFLUENCE—SUPPORT OF JUDGMENT SETTING ASIDE DEED WITHOUT CONTRARY SHOWING.—Where the son lived with his mother, hired her servants, and had been for a long time the manager of her property, and for years her agent holding her general power of attorney, it is held that the confidential relation so existing between them would warrant the inference of undue influence on the part of the son in obtaining a deed of real property from his mother, which would constitute sufficient support for the judgment of the

superior court in setting the deed aside, without a clear showing which would rebut such inference. In the absence of such clear and convincing proof, the conveyance is presumed to have been obtained by undue influence and to be void.

ID.—INDEPENDENT ADVICE—BURDEN OF PROOF TO REBUT INFERENCE.—

Persons standing in a confidential relation toward others cannot entitle themselves to hold benefits conferred upon them unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them, which had been given in private by some one of the grantor's own selection, when the grantor was not surrounded with dominating influences favoring the transfer; or, at least, must assume the burden of showing to the entire satisfaction of the court that the gift was made freely and voluntarily, with full knowledge of the facts, and with entire understanding of the effect of the transfer.

ID.—PRESUMPTION OF UNDUE INFLUENCE NOT OVERCOME—PRESUMPTION CONFIRMED BY POSITIVE EVIDENCE OF DOMINATION.—

It is held, in view of all the evidence, impossible to rule that the court should have been convinced, or that it should have determined, that the presumption of undue influence was overcome, and that the asserted conveyance should be held valid, but, on the contrary, there is strong proof, actual and circumstantial, to show the dominating influence of the defendant over his mother.

ID.—SUPPORT OF FINDING AS TO NONDELIVERY OF DEED—SUBSEQUENT RECORD NOT PROOF—QUESTION OF FACT—INTENTION OF GRANTOR.—

It is held that the finding that there was no intentional or actual delivery of the deed by the purported grantor is sufficiently supported by the evidence. The subsequent recording of the deed by the purported grantee is not a delivery, unless it comes from the hand of the grantor, or someone claiming through or under the grantor. The delivery of the deed is a question of fact, depending upon the intention of the grantor as to passing title. But the court might rationally conclude from the evidence that the grantor neither said nor did anything to indicate an intention to deliver the deed, or to pass the title.

ID.—EVIDENCE—TESTIMONY OF ATTORNEY AS TO CONVERSATION BETWEEN ATTORNEY AND BOTH PARTIES—RELATION OF ATTORNEY TO PARTIES IMMATERIAL.—

The testimony of the attorney who drew the deed was admissible to prove a conversation participated in between himself, the grantor and the grantee, regardless of whether he was the attorney solely of the grantor, or of the grantee, or of both parties. In either case, the other party may require him to testify to such conversation.

ID.—EVIDENCE OF FRAUD—DELAY AND ATTEMPTED SECRECY IN RECORD OF DEED.—

The conduct of the defendant in long delay and in attempted secrecy of the record of the deed was admissible as tend-

ing, if unexplained, to show a consciousness of fraud in the obtaining of the deed, and to indicate a purpose to avert any suit to set aside the deed until after the death of the grantor.

ID.—AFFIDAVIT OF GRANTOR AGAINST SUIT TO SET ASIDE DEED—REBUTAL—PROOF BY ADMINISTRATOR OF CONTRARY DECLARATIONS.—Where the grantor was induced by the son to make an affidavit that her suit to set aside her deed to the son was unauthorized, and that she did not employ the attorney who brought it, and that she did not fully understand the nature of the proceedings, it was proper for her administrator, who carried on the suit after her death, to rebut such affidavit by proof of her contrary declarations that she did understand the situation and that her purpose was as indicated by the complaint filed. Such declarations are within the rule declared in section 1850 of the Code of Civil Procedure, and the principle that words so connected with and illustrative of an act as to elucidate and define its character are considered as appertaining thereto, and admissible to clarify the same.

ID.—GENERAL RULE AS TO EVIDENCE OF DECLARATIONS BEFORE AND AFTER DEED—STATE OF MIND—QUESTION OF REMOTENESS.—It is a familiar rule of evidence that when a grantor's mental condition on the date of a deed is in issue, a showing may be made of his mental condition both before and after its date, as indicative of the probable mental condition of the grantor at the date in question. It is only necessary that the matters testified to be sufficiently near in point of time in order that the testimony may be of value in determining the question directly in issue. The question of remoteness is one for the court to determine, and the weight of the testimony is to be governed according to the facts. The state of mind at one time is competent evidence of its state at other times, not too remote, because mental conditions have some degree of permanency.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

W. F. Williamson, and John W. Sullivan, for Appellant.

John E. Alexander, and Beasley & Fry, for Respondent.

BURNETT, J.—By a verified complaint this action was begun by Mary J. Piercy to set aside a deed in which she was the grantor and her son, Edward M. Piercy, the grantee, and after her death, the administrator, another son, was substi-

tuted as the party plaintiff. The consideration for the deed was "love and affection."

The trial court found in favor of plaintiff, adjudging the deed void on the ground that it was obtained by undue influence. There was also a finding that the deed was not delivered. Both theories were adequately presented in the complaint, and it is manifest that the finding as to each is sufficient to uphold the judgment. From an examination of the record we are satisfied also that it must be held that the material findings of the court are amply supported by the evidence.

The following facts, fairly deducible from the testimony, favorable to respondent—some of which are indeed not disputed—are sufficient to reveal the character of the controversy: On March 30, 1901, the date on which the deed was signed by Mary Piercy, she was eighty-five years old or over. For ten or twelve years prior thereto she could not walk without assistance, could not dress herself and she was most of the time in bed. She was not able to attend to her household duties. If she walked from one room to another she would be exhausted, and she was not able to get about without having some one with her. She was afflicted with a kidney or bladder disease that was the occasion of constant trouble and annoyance. At the time of the transaction in reference to the deed she was bedfast, and was so weak that she had to be helped to sit up in bed to sign the instrument. As to her bodily condition, looking through the testimony of her children, we behold an old lady, enfeebled by years and disease and trouble, needing constant assistance, unable to supply her own wants and entirely dependent upon the care of others. The court therefore properly found that, on the thirtieth day of March, 1901, she was and "for a long time prior thereto had been feeble in body and physically weak."

On said date she was subject to peculiar lapses of memory. In February preceding, at the funeral of her son, David, she talked in a loud, childish way, showing no appreciation of the occasion; she was forgetful and "all at sea" about property affairs during the early part of 1901; her mind was very changeable; she would be "of one mind one day and of an entirely different mind the next day"; she would order things and forget immediately whether she had paid for them; she

could not remember things that happened two or three days before; if she was sick with a bilious spell she would think someone was poisoning her; a few days before the deed was signed, an attorney, Mr. Rhodes, accompanied by a notary, went to her room with the deed to obtain her signature and acknowledgment. The attorney said to her: "We have come out to—he [referring to the notary] has come out with me to take your acknowledgment to the deed from yourself to Ed." She replied: "What deed? I do not know what you are talking about. I do not want to make any such deed as this now." Mr. Rhodes then said: "This is the deed that you and Ed and I have been talking about here, and that you are to make to him conveying to him the land that came to you from the estate of your deceased son, David J. Piercy," and she replied: "Why, I do not propose to make any such deed. I do not want to do it. I am not going to do it. Why should I do it? I do not understand this; I won't do it." Other circumstances appear, but the foregoing are sufficient to justify the finding of the court that by reason of her old age and mental weakness she was incapable of transacting or understanding business transactions "in a thoroughly intelligent manner and was particularly incapable of properly understanding the nature, effects and consequences of any act regarding the transfer of real property without independent advice and careful explanation thereof."

As already seen, Edward M. Piercy was the son of Mary J. Piercy. Moreover, they lived in the house together; he hired her servants and for a long time he had been the manager of her property and for years her agent, holding her general power of attorney. The confidential relation, therefore, so conspicuous in legal literature, existed between them in its most exacting form. The foregoing facts would warrant the inference of undue influence, and they constitute sufficient support for the judgment of the lower court. The burdens and obligations imposed by the "confidential relation" and the significance of the elements of want of consideration and of physical and mental weakness in cases like this are fully considered and the authorities reviewed in the decision of this court in *Nobles v. Hutton*, 7 Cal. App. 21, [93 Pac. 292]. Therein it is declared that "It is a well-settled rule of equity jurisprudence that all gifts, contracts or benefits, from a prin-

cipal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void," and furthermore, that "persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them and the advice should be given in private by someone of her own selection and when the grantor is not surrounded with dominating influences favoring the transfer." (See, also, *Payne v. Payne*, 12 Cal. App. 251, [107 Pac. 148]; *Moore v. Moore*, 56 Cal. 89; *Ross v. Conway*, 92 Cal. 635, [28 Pac. 785]; *Allors v. Jewell*, 94 U. S. 506, [24 L. Ed. 260].)

But granting that, in the absence of independent advice, under the other conditions mentioned such conveyance might be upheld, it will not and cannot be disputed that the burden is cast upon the donee to show to the entire satisfaction of the court that the gift was made freely and voluntarily with full knowledge of the facts and with entire understanding of the effect of the transfer, and in the absence of such clear and convincing proof, the conveyance is presumed to have been obtained by undue influence and to be void.

As we view the case, it is impossible to hold that the lower court should have been convinced or that it should have determined that said presumption was overcome and the asserted conveyance should be held valid. Indeed, aside from the weight to be attributed to the foregoing considerations, we find in the record evidence of other circumstances affording additional support for the judgment of the lower court. Among these is the important fact, embodied in the findings, that "neither at the time of nor prior to the date of signing said deed did the said Mary Piercy have any legal or other advice except from persons acting for and in the interest of said Edward M. Piercy in reference to the said transaction or with reference to the nature, effects and consequences to herself of her said act and deed." A distinguished lawyer, who had been for many years a friend of Mary J. Piercy, and in whom, no doubt, she had confidence, visited her and advised the execution of the deed, but the court was justified in concluding that the adviser was employed by appellant and was zealous to promote the cause of his client. The circum-

stance of said friendship and confidence would, of course, naturally and properly excite in the mind of the trial judge a greater distrust of the occurrence. Other facts are detailed by witnesses which strengthen the inference that appellant exercised a dominating influence over the mind of his mother and that he took advantage of the situation for his personal aggrandizement. As illustrative of these, we refer to the following incidents: At times he refused to allow the friends and neighbors to visit her; both before and after the signing of the deed he prevented her relatives from seeing her on different occasions. In this connection the wife of plaintiff testified that, shortly before the deed transaction, she visited Mary J. Pieroy and appellant ordered her not to come there any more and not to hire any more help as he intended to take care of that himself, and that his manner was rough and brutal, and that he subsequently ordered her out as before, saying, "You get out—either go the back or front of the house, but you get away from here"; that he intimidated his mother into signing papers, one incident being given by the last-mentioned witness, as follows: "Ed Pieroy came into the room where his mother was and said to her, 'Here, come sign this paper.' She said, 'What for?' He says, 'Never mind; sign it, I tell you,' and she seemed to object again and he demanded her again to sign it and she did sign it. His manner was rough and cross and she seemed to fear him." Miss Annie Higgins also testified that "Ed Pieroy was very rough-spoken toward his mother. She would be frightened and would not say a word and she would do just what he told her to do." On one occasion she was taking milk to Mrs. Pieroy, and Edward Pieroy said to her: "I don't want you coming over here any more." She said, "All right; why?" And he answered: "Never mind; I tell you not to come over here any more." Furthermore: "Mary Pieroy spoke to Ed Pieroy in my presence regarding the locking up of the gate or fence. She asked him what he did that for, and he said: 'That is my business.'" The witness testified also that she was present at different times when E. M. Pieroy presented papers for his mother to sign. "He said: 'I need some money mother, sign this paper.' So she signed it for him. I saw him bring in papers two or three times. He would not read the papers nor explain them to his mother. He was very rough spoken and

coarse. He used vulgar language toward his mother, and she would be frightened and she would do anything he would tell her to do."

Again appellant did not record the deed for over six months after it was signed, and then he attempted to conceal the recordation from the newspapers. When Mrs. Piercy, however, learned that it was recorded, she employed an attorney, J. C. Black, to bring this action. Mr. Black testified that after bringing the action he received a message from Mrs. Piercy's house, and when he went there he found her in bed and "Ed Piercy came out of the adjoining room and handed his mother a folded paper in my presence and demanded that she give it to me, and she asked Ed what it was. 'No matter,' he says, 'hand it to Mr. Black,' and his manner was decidedly excited and angry and threatening. The paper was a demand that I dismiss the suit that had been commenced against Ed Piercy." Thereafter the deposition of Mrs. Piercy was taken. Respondent says: "It is the most remarkable deposition ever submitted to a court." Our information is manifestly too limited to verify this, but the appearance of the document is certainly peculiar and calculated to excite a degree of suspicion as to its integrity. The unusual feature about it is that there are so many interlineations that contradict the original transcription. Of this, two examples will suffice. She was asked this question: "Then it is alleged here in the complaint filed by Mr. Black that on the thirtieth day of March last you made a deed of your interest as heir of David J. Piercy to the property; I want you to tell why you made that deed, if you made it, did you make it?" The answer as transcribed was: "I don't remember any deed making it." When corrected this was stricken out and the word "yes" substituted. Again she was asked: "Well, then, I understand you to say you don't know whether or not the deed conveyed to Eddie the property that he conveyed to you?" The answer as taken down was: "No, I don't know nothing about it. I know whether or not—I don't know what you are—the meaning of what you are driving at." As corrected, the answer is "Yes." It appears also that she several times appealed to her son, Edward, for answers to the questions, and it is quite manifest that she was not free from the dominating influence of his stronger personality. After se-

curing the discharge of Mr. Black, appellant procured friends of his own to represent his mother in the litigation, and the cause was tried with a result favorable to defendant. Honorable A. L. Rhodes, the trial judge, however, granted a motion for a new trial upon the ground of "irregularity in the proceedings of the defendant by which the plaintiff was prevented from having a fair trial of the action." The "irregularity" was shown by an affidavit of R. M. F. Soto to the effect that "through the wrongful procurement of defendant the action was, so far as the plaintiff's side thereof was concerned, practically tried as a mere formal matter, without any full and complete presentation of her case, and with the understanding on the part of those representing her at the trial, both that the transaction between the parties was entirely regular and valid, and that the real object of the trial was to dispose of any question as to the validity of the deed and confirm the title of defendant to the land described therein, such representatives being without knowledge as to material evidence which could have been produced in support of the cause of action stated in the complaint." (*Piercy v. Piercy*, 149 Cal. 165, [76 Pac. 508].) The cumulative effect of the foregoing circumstances upon the mind of the trial judge in the determination of the question of undue influence can be easily appreciated.

The finding as to nondelivery, we think, can be said also to have substantial support. The question whether the deed was delivered is a question of fact and must be determined by the circumstances surrounding each particular transaction. (*Kenniff v. Caulfield*, 140 Cal. 40, [73 Pac. 803]; *Moore v. Trott*, 162 Cal. 268, [122 Pac. 462].) The actual fact to be ascertained is the intention of the grantor as to passing title. (*Brown v. Westerfield*, 47 Neb. 399, [53 Am. St. Rep. 532, 66 N. W. 439]; *Huse v. Denn*, 85 Cal. 399, [20 Am. St. Rep. 232, 24 Pac. 790].)

The recording of a deed is not a delivery by the grantor to the grantee unless the deed comes from the hand of the grantor or someone claiming through or under him. (*Barr v. Schroeder*, 32 Cal. 609.)

"A delivery may be effected by a grantor doing something and saying nothing, or doing nothing and saying something or by both doing and saying something." (*Flint v. Phipps*,

16 Or. 437, [19 Pac. 543].) The court below might rationally conclude that the grantor neither did nor said anything to indicate an intention to deliver the deed or to pass the title and that by reason of her weakened physical and mental condition, she had no definite purpose in relation to the matter. That she did not actively and consciously participate in the transfer is not an unreasonable inference from the testimony of Mr. Rhodes, who said that he presented the deed to her and she signed it; that "the deed was not read to her but its contents were explained. She was helped to sit up in bed because of her physically weak condition. After Mrs. Piercy had signed the deed the notary took the car from her house, went down to his office, put his acknowledgment and seal on the deed and I took it to my office. While it was being signed, of course, it was in Mrs. Piercy's hands; after it was signed it went into the notary's hands; and from the notary's hands it went into my hands, and from my hands it went to Ed Piercy. During all the time it was at the Piercy house I saw it. Mrs. Piercy said nothing about the deed at the time she affixed her signature. She said nothing to me or Mr. Brundage or any other person after she had signed the deed. At the time of and after signing the deed Mrs. Piercy did not say anything to me or in my presence concerning the delivery of the deed." After a considerable period of time appellant asked Mr. Rhodes for the deed and it was given to him. From this testimony it is not unreasonable to conclude that in the transaction Mrs. Piercy was a mere passive instrument acting rather as an automaton manipulated by the agency of others than a willing and conscious actor in the formal transfer with a clear understanding and purpose that the title to the property should be vested in the grantee.

As to the rulings upon the admissibility of evidence, we may say we find no prejudicial error committed by the court during the progress of the trial.

Objection was made to the testimony of Mr. Rhodes as to a conversation participated in by him, Mrs. Piercy and appellant, on the ground that it was a privileged communication by reason of his relation as attorney for Mrs. Piercy. There is a controversy as to whether said testimony was not stricken out, but at any rate we cannot say that the ruling was erroneous, if for no other reason, because it does not appear that he

was her attorney. It is not made clear for whom he was acting. Of course, if he was the attorney for neither party, the communication was not privileged. But, assuming that he was the attorney of Mrs. Piercy, the conversation was not privileged because Edward M. Piercy was present and heard what was said. If he was the attorney for both parties, in any controversy between them the same condition would prevail. "When two parties address a lawyer as their common agent, their communication to the lawyer as far as concerns strangers will be privileged. But as to themselves, they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations. (1 Wharton on Evidence, sec. 587; *Hanlon v. Doherty*, 109 Ind. 37, [9 N. E. 782]; Greenleaf on Evidence, sec. 244; *Michael v. Foil*, 100 N. C. 178, [6 Am. St. Rep. 577, 6 N. E. 264].) In the latter case it was held that an attorney who wrote a deed could be examined as to what was said by the parties at the time relative to the transaction, whether he was acting as attorney for the one who called him or for both." (*In re Bauer*, 79 Cal. 312, [21 Pac. 759]. See, also, *Murphy v. Waterhouse*, 113 Cal. 467, [54 Am. St. Rep. 365, 45 Pac. 866]; *Harris v. Harris*, 136 Cal. 379, [69 Pac. 23].)

That the conduct of appellant in attempting to keep secret the recording of the deed was a proper subject for inquiry seems entirely clear. It was some evidence—open, however, to explanation—of the consciousness of fraud in connection with his acquirement of the deed. Secret, equivocal or evasive conduct, either precedent or subsequent, is often of persuasive force in the determination of the good faith of a transaction. So, subsequent concealment or secrecy as to the deed would be indicative of knowledge of the dishonesty of the original transaction and might indicate a purpose to avert any suit to set aside the conveyance until after the death of the grantor. The principle is as true now as it ever was that "Men love darkness rather than light because their deeds are evil."

The court admitted evidence of the declarations of Mary Piercy made subsequent to the date of the deed. These declarations were received for the purpose of showing the "relation of the parties." It is contended that the relation of the parties existing after the deed transaction was consummated

is entirely immaterial. But it is a familiar rule of evidence that when a person's mental condition at a certain time is in issue, a showing may be made of his condition both before and after, as indicative of his probable condition at the particular date in question. Some of the evidence along this line was offered in rebuttal of an affidavit introduced by appellant. This affidavit purported to have been made by Mrs. Piercy, and was to the effect that she was an unwilling plaintiff in this action, that she had not employed Mr. Black as her attorney, that she did not know that she was bringing the action and did not fully understand the nature of the proceedings. In contradiction to these assertions it was certainly proper for respondent to show that Mrs. Piercy did understand the situation and that her purpose was as indicated by the complaint, which was filed. This could be shown only by evidence of her acts and declarations at the time—she being dead—and we can see no legal objection to the evidence. It is clearly within the rule declared by section 1850 of the Code of Civil Procedure that "Where, also, the declaration, act or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction." Words so connected with and illustrative of an act as to elucidate and define its character are considered as appertaining to the act or situation and, like expression on the human face indicating the character of the man, are received in evidence to clarify a situation that might otherwise remain obscure. (*Cooper v. State*, 63 Ala. 80.)

As to the other evidence of Mrs. Piercy's statements, it may be said generally that it is brought within the principle of the decisions holding in effect that "declarations by the maker made subsequent to the execution of wills or deeds are admissible as showing his state of mind. Such declarations need not be part of the *res gestae*, but are admissible because from a fair inference from all the circumstances such declarations show the party's mind at the time of the execution, his susceptibility to influence and his relations with those around him and the persons who are beneficiaries of his bounty. It is only necessary that the matters testified to should be sufficiently near in point of time that the testimony may be of value in determining the question directly in issue. The ques-

tion of remoteness is one for the court to determine, and the weight of the testimony is to be governed according to the facts." (*Chambers v. Chambers*, 61 App. Div. 299, [70 N. Y. Supp. 483]; *In re Denison's Appeal*, 29 Conn. 399; *Shailer v. Bumstead*, 99 Mass. 112; *Miller v. Livingstone*, 31 Utah, 415, [88 Pac. 338]; *Lane v. Moore*, 151 Mass. 87, [21 Am. St. Rep. 430, 23 N. E. 828].) The rule is recognized by our code, section 1870, Code of Civil Procedure, subdivision 4. There is some conflict in the authorities whether such evidence is admissible upon the issue of undue influence, but as to this, Wigmore, in volume 3, on Evidence, section 1738, declares that it "requires a consideration of many circumstances, including his state of affection or dislike for particular persons, benefited or not benefited by the will; of his inclination to obey or to resist these persons; and in general of his mental and emotional condition with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue. This use of such data is universally conceded to be proper." The question necessarily involves two elements, as pointed out by Dixon, J., in *Rusling v. Rusling*, 36 N. J. Eq. 603; first, the conduct of him who is charged with exercising the undue influence, and second, the mental state of the other produced by said influence, which may require a disclosure of his strength of mind and of his purpose as to the disposition of the property both immediately before the conduct complained of and while subject to its influence. In order to show his "mental state at any given time his declarations at that time are competent because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise the state of mind at one time is competent evidence of its state at other times, not too remote, because mental conditions have some degree of permanency."

Here the competency of the grantor to understand any business transaction was directly in issue, and it was the contention of respondent that the dominating and coercive influence of appellant extended over the entire period of inquiry. It would seem, therefore, that the ruling of the court admitting the declarations is unquestionably correct.

The principle is not that involved in the case of *Bury v. Young*, 98 Cal. 446, [35 Am. St. Rep. 186, 33 Pac. 338], and *Ord v. Ord*, 99 Cal. 523, [34 Pac. 83]. In the former it was said that the declarations and acts of the grantor "made and done in his own interest months after the deed was delivered are not admissible as indicating his intentions in delivering the deed," and in the latter, that a "grantor will not be permitted to disparage his deed by declarations made or acts done by him in his own interest subsequent to its execution." But in those and other similar cases there was no issue as to fraud or the mental condition of the grantor, and the testimony was offered as evidence of the truth of the facts asserted in it and was clearly self-serving and hearsay. In a case like this it is plain the witness is permitted to detail declarations which he has heard, not as evidence of the truth of the fact asserted but of a spontaneous and unreflecting expression of the mental and emotional condition of the declarant. The distinction is marked and vital and recognized by the authorities.

An examination of the record convinces us that from a legal and equitable standpoint it would be wrong to reverse the judgment. It is, therefore, affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 22, 1912.

[Civ. No. 903. First Appellate District.—April 26, 1912.]

J. G. KEELING, Respondent, v. SCHASTAY & VOLLMER,
a Corporation, Appellant.

BUILDING CONTRACT—PREVENTION OF PERFORMANCE—LOSS OF BUILDING BY FIRE—PROTECTION BY CONTRACT ESSENTIAL.—Where one contracts to furnish labor and materials in the building of a house or other structure for a specified sum, to be paid in installments, the builder cannot recover for a partial construction, in case the building is destroyed by fire, without the fault of either party, unless the builder is protected against such contingency by the terms of the contract.

ID.—OTHER CONDITIONS OF RECOVERY BY BUILDER FOR PREVENTION OF PERFORMANCE ENUMERATED—ACT OF GOD—FIRE NOT INCLUDED.—

The builder can only recover for partial compensation when the full performance of his contract is prevented by the act of the other party, or by operation of law, or by the act of God, or of the public enemy. Fire is not to be classified as an act of God.

ID.—CONTRACT FOR WORK AND MATERIALS ON EXISTING BUILDING—IMPLIED CONDITION OF CONTINUED EXISTENCE—LOSS BY FIRE—ASSUMPSIT FOR REASONABLE VALUE.—Where one agrees to furnish work and materials upon an existing building, such as to do painting and plastering work thereon, such agreement is upon the implied condition that the building shall continue to exist, and its destruction by fire, without the fault of either party, will excuse the full performance of such agreement, and will entitle the agreeing party to recover the reasonable value of the work and materials in part performed, prior to the fire, upon an implied assumpsit.

ID.—ASSUMPSIT NOT UPON CONTRACT—TERMS OF CONTRACT NOT CONTROLLING.—An action will only lie upon such contract when it has been fully performed; but an action of assumpsit for work and materials furnished prior to the accidental loss of the building by fire, to recover its reasonable value, is not upon the contract, and the terms of the contract in this regard are not controlling.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Wright & Wright, for Appellant.

Louis H. Brownstone, for Respondent.

KERRIGAN, J.—This is an appeal by the defendant from a final judgment in favor of the plaintiff, taken within sixty days after entry, and from an order denying defendant's motion for a new trial, in an action in *quantum meruit* for labor performed and materials furnished.

Briefly, the facts are that in the month of June, 1907, the defendant entered into a contract with the Cliff House Company, a corporation, to alter and repair an existing building known as the Cliff House. Subsequently the defendant made a contract with A. C. Wocker, plaintiff's assignor, whereby certain painting and plastering work in and upon said building was to be done by the latter for a sum not exceeding

\$4,700, and he was to accept payments on the basis of seventy-five per cent of the work done from time to time as the work progressed, the remaining twenty-five per cent being payable thirty-five days after its completion.

Prior to the time Wocker was able to complete his contract, and after he had furnished labor and materials of the reasonable value of \$3,545.96, the building was destroyed by fire without the fault of either party to the contract. At this time Wocker had received on account a payment of \$1,800. This suit is to recover \$1,745, alleged to be the difference between the amount paid and the reasonable value of the work as it had progressed up to the time of the destruction of the building.

It is well settled that where one undertakes to furnish labor and materials in the building of a house or other structure for another for a specified sum, the builder cannot recover for a partial construction in case the building be destroyed without the fault of either party, unless the builder is protected against such contingency by the terms of the contract. In order to entitle the builder to recover, full performance of the contract is necessary, unless he has been prevented by the act of the other party, or by operation of law, or by the act of God, or by the public enemy (*Carlson v. Sheehan*, 157 Cal. 692, [109 Pac. 29]; *Green v. Wells*, 2 Cal. 584); and fire is not classified as an act of God. (*Pope v. Farmers' Union & Milling Co.*, 130 Cal. 139, [80 Am. St. Rep. 87, 53 L. R. A. 673, 62 Pac. 384].)

It is also very well established in this country that where one, as in this case, agrees to furnish labor and materials on an existing building, the property of another, the agreement is upon the implied condition that the building shall remain in existence, and that the destruction of it without the fault of either party will excuse performance of the contract by the person performing such labor, and entitle him to recover the reasonable value of the part performance already effected. This view, it appears, is contrary to the English doctrine (*Appleby v. Dods*, 8 East, 300; *Appleby v. Myers*, L. R. 2 C. P. 651); but it is the uniform rule in this country (30 Am. & Eng. Ency. of Law, 2d ed., p. 1251, and numerous cases cited), except in the state of Illinois. (*Huyett & Smith Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 233, [59 Am. St. Rep. 272, 47 N. E. 384].)

In *Hollis v. Chapman*, 36 Tex. 1, a carpenter contracted to furnish the materials and to do the work on the defendant's brick building, then in course of construction, for a fixed sum of money, but before the work was completed the building was destroyed by fire without the fault of either party to the contract. The action was to recover for the materials furnished and labor done, and it was held that the carpenter was entitled to recover.

So in *Cleary v. Sohler*, 120 Mass. 210, where the plaintiff made a contract to lath and plaster a certain building for an agreed price per square yard. When the contract was about one-half performed the building was destroyed by fire. The plaintiff sued in *assumpsit* for work done and materials furnished, and it was held that he was entitled to recover.

In *Niblo v. Binsse*, 3 Abb. Dec. (N. Y.) 375, 1 Keyes, 476, the plaintiff's assignor contracted to do certain plumbing work in a house owned by defendant's testator. Part of the work was to be paid as it progressed, and the final payment upon its completion. During the performance of the contract the building was burned without fault of the parties, and the plaintiff was permitted to recover for the work performed. This case, like the others, proceeded on the theory that there was a breach of the implied undertaking by the owner of the continued existence of the building, which was necessary to enable the contractor to perform his agreement.

In the case of *Butterfield v. Byron*, 153 Mass. 517, [25 Am. St. Rep. 654, 12 L. R. A. 571, 27 N. E. 667], the court says: "When work is to be done under a contract on a chattel or building which is not wholly the property of the contractor and for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract and leave no right of recovery of damages in favor of either against the other (citing cases). In such cases, from the very nature of the agreement as applied to the subject matter, it is manifest that while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it,

and by its terms the contract is not to be performed if the subject matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived." But says the same authority, "Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure to completely perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied *assumpsit* for what he has done."

It is also contended by defendant that if the plaintiff is entitled to recover at all, he is entitled to recover only seventy-five per cent of the contract price of the work done and materials furnished up to the time of the fire. If this had been an action upon the contract defendant's position would be sound; but this is an action for the reasonable value of the work and materials furnished, and, therefore, as seen by the authorities just adverted to, the terms of the contract in this regard do not control.

The evidence is sufficient to support the findings, which cover all the material issues and support the judgment.

The judgment and order appealed from are affirmed.

Hall, J., and Lennon, P. J., concurred.

[Crim. No. 245. Second Appellate District.—May 1, 1912.]

THE PEOPLE, Respondent, v. JOE CHUTUK, Appellant.

CRIMINAL LAW — CHARGE OF MURDER—PROPER CONVICTION OF MANSLAUGHTER—INSTRUCTIONS AS TO MURDER IN FIRST AND SECOND DEGREE NOT PREJUDICIAL.—Where a defendant charged with murder was properly convicted of manslaughter under the evidence, he cannot be prejudiced by alleged errors in instructions given with reference to murder in the first and second degree of which he was acquitted. It is therefore unnecessary to consider a specification of error in refusal to charge that such higher offenses were not made out.

Id.—PROPER INSTRUCTION AS TO NATURE OF OFFENSE—KILLING CAUSED BY BLOW—"ADEQUATE PROVOCATION."—Where the killing was caused by a blow with the fist on the side of the jaw and neck of the

deceased, in the heat of passion, the court properly instructed the jury that "when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter," but that "if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation, which is not produced by opprobrious or contemptuous actions or gestures, without assault upon the person or trespass against lands or goods."

ID.—INSTRUCTIONS PROPERLY PRESENTING A QUESTION OF FACT FOR THE JURY.—It is held that these instructions and other similar instructions as to the intent with which the blow was struck presented a question of fact for the jury, and were not improper, and that the court properly refused directly to instruct the jury as to the intent with which the blow was struck, which was a question for the jury.

ID.—EFFECT OF INSTRUCTIONS TAKEN TOGETHER.—It is held that taking the instructions together, they fairly presented the law to the jury, and that there was nothing therein which could have a tendency to mislead the jury or to prejudice the rights of the defendant, either as to the law of self-defense, or the subject of reasonable doubt, and that there was no prejudicial error in the giving or refusal of any instructions.

ID.—UNWARRANTED CRITICISM OF ACTION OF DISTRICT ATTORNEY.—It is held that a criticism urged by defendant of the action of the district attorney is unwarranted; and that there is nothing in the record indicating any improper statement made by the district attorney, not based upon proper and logical inferences from the testimony adduced.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Paul J. McCormick, Judge.

The facts are stated in the opinion of the court.

Schweitzer & Hutton, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

ALLEN, P. J.—The defendant and appellant was informed against by the district attorney of Los Angeles county for the crime of murder. He was convicted of manslaughter, and the judgment of the court was that he suffer imprisonment in

the state prison for the term of two years. He appeals from the judgment and an order denying a new trial.

There is evidence in the record tending to establish these facts: The defendant, a sewer contractor, on the date of the homicide was engaged in superintending the work of excavation in front of the property of one Webb. A controversy arose between the contractor and Webb with reference to the manner in which the work was done, Webb claiming that there was an unnecessary infringement of his rights of ingress and egress to his property. Both parties seem to have become very angry over the controversy. Both were unarmed. Webb, however, at the conclusion turned to go to his house, when defendant and appellant struck him a violent blow with his fist on the side of the jaw and neck, causing a fracture of both jaws and of the thyroid and cricoid cartilages. Webb, from the injuries received from the blow, shortly thereafter died. There can be no question but that the record discloses the unlawful killing by defendant. It may not have been intended, but resulted from an unlawful act, not amounting to a felony, and was therefore manslaughter. (*People v. Munn*, 65 Cal. 214, [3 Pac. 650]; *People v. Stokes*, 11 Cal. App. 760, [106 Pac. 251].)

Appellant specifies as error certain instructions of the trial court with reference to murder in the first and second degree. Inasmuch as defendant was acquitted of murder in the first and second degree, no prejudice is manifest. As said in *People v. Quimby*, 6 Cal. App. 487, [92 Pac. 493]: "The jurors must be presumed to be possessed of such a degree of intelligence as to enable them to comprehend and understand the pertinency to the evidence of the court's declaration of the law, and that, under the evidence, their verdict could not be founded upon any consideration of the elements constituting the higher grades of the offense." (See, also, *People v. Woods*, 147 Cal. 273, [109 Am. St. Rep. 151, 81 Pac. 652]; *People v. Chaves*, 122 Cal. 140, [54 Pac. 596].) The fact that the defendant was acquitted of murder in the first and second degree renders it unnecessary to consider the specification with reference to the refusal of the court to charge that such offense had not been made out. We see no error in the action of the court charging the jury that "when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to

adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter; in such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder"; that "if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation"; that adequate provocation is not produced by opprobrious, contemptuous actions or gestures without an assault upon the person, or trespass against lands or goods. These charges and others with reference to the intent with which the blow was struck, and which was a question of fact for the jury, were not improper. Nor do we see any error in the charge of the court to the effect that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for the killing. Under the facts of the case, it was for the jury to determine whether or not this controversy had been sought by the defendant and his intent and purpose in connection therewith. Those instructions of the court with reference to the use of deadly weapons, and referring to the higher grades of the offense, could not in any degree have prejudiced defendant. As before said, he was acquitted of such charges, and the court properly charged the jury as to the presumption attaching to acts voluntarily and willfully done, and the intent as to the natural, probable and usual consequences thereof. (*People v. Besold*, 154 Cal. 368, [97 Pac. 871].) The court properly charged the jury that, "while the defendant cannot be convicted unless his guilt is established beyond a reasonable doubt, still the law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible; moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind." This was a correct exposition of the law, and no error is apparent in connection therewith. We see no error of the court in refusing an instruction to the effect that the sewer, during the process of construction, was as much the property of the defendant as if it consisted of a house and lot. We can conceive of no theory upon which such an instruction, under the

record, would be permissible. The court properly refused to instruct the jury as to the intent with which the blow was struck; that was a matter for the jury to determine. Taking the instructions together, we think they fairly presented the law to the jury, and that there was nothing therein which could have a tendency either to mislead the jury or to prejudice the rights of defendant. We see no prejudicial error in the action of the court overruling objections to certain testimony, the effect of which might tend to show malice upon the part of the defendant. The jury by its verdict acquitted the defendant of any malice, and the error, if any, was harmless.

Defendant's criticism of the action of the district attorney we think unwarranted. There is nothing in the record indicating that any statement made by the district attorney was not based upon proper and logical inferences from the testimony adduced.

A careful examination of this record indicates to our minds that the defendant was clearly shown to have been guilty of manslaughter, and through the verdict and judgment there was no miscarriage of justice.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 934. Second Appellate District.—May 1, 1912.]

S. WEBSTER, Respondent, v. CHRIS CARR, Appellant.

MECHANIC'S LIEN—FORECLOSURE—PLEADING—TIME FOR PERFORMANCE OF WORK—GENERAL DEMURRER—CAUSE OF ACTION.—A complaint in an action to foreclose a mechanic's lien, which alleges the performance of ten days and seven hours' work upon the building between the first day of June and the twenty-first day of July, 1909, and that the building was completed on the sixth day of July, 1909, shows that sufficient time elapsed for the completion of such work before the completion of the building, and is not subject to a general demurrer on the ground that it does not state a cause of action.

ID.—GROUND OF SPECIAL DEMURRER FOR UNCERTAINTY—ABSENCE OF SPECIAL DEMURRER—WAIVER.—The only ground of objection to the complaint is that it is uncertain as to the time within which the work was performed, and when it ceased; but in the absence of a special demurrer on that ground, objection to such uncertainty is waived, and cannot be considered upon appeal.

APPEAL from a judgment of the Superior Court of Kern County. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

J. R. Dorsey, for Appellant.

T. F. Allen, for Respondent.

JAMES, J.—Plaintiff brought this action to enforce by foreclosure an alleged lien accruing to him as a mechanic who performed labor upon a building being constructed for defendant. It is alleged in the complaint that defendant entered into a contract with one Morgan for the construction of a five-room brick cottage and that the contract was in writing and duly recorded; that plaintiff was employed by Morgan, the contractor, to perform labor as a painter upon the cottage, for which Morgan agreed to pay him the reasonable value of his services; that pursuant to such employment plaintiff did, "between the first day of June, 1909, and the twenty-first day of July, 1909," perform ten days and seven hours' labor in painting said cottage, which labor was of the reasonable value of \$54.37. It was further alleged that the cottage was completed on the sixth day of July, 1909, but that no notice of completion was filed with the county recorder, and that on the twenty-first day of July, 1909, plaintiff filed and recorded his claim of lien. The complaint contained other appropriate allegations as to the description of the real property upon which the cottage was constructed, and set forth that the land described was necessary for the convenient use of the building. To this complaint a general demurrer was interposed, which was overruled by the court and defendant having failed to answer the complaint within the ten days allowed him so to do, decree was thereupon entered in accordance with the prayer of the complaint. From that judgment the appeal is taken.

It is insisted on the part of appellant that the complaint of plaintiff failed to state a cause of action for the reason that it does not appear therefrom that the labor performed by the plaintiff was performed prior to the date of the completion of the building, which plaintiff alleged to be the sixth day of July, 1909. To give force to this contention plaintiff's alle-

gation that the work performed by him was done between the first day of June and the twenty-first day of July is referred to, and it is argued that for aught that is disclosed by the complaint the ten days and seven hours' work may have been performed after the sixth day of July. It is true that sufficient time had elapsed after the date upon which it is alleged the building was completed, and before the twenty-first day of July, to comprehend the entire term during which plaintiff alleged that he performed the work, but it is equally true that such labor may have been performed between the first day of June and the sixth day of July. The allegations of the complaint made it uncertain as to the particular time and date when the work commenced and when it ceased. However, this defect was not such as to render the complaint insufficient in its statement of a cause of action, that being the only ground assigned by the demurrer. Defendant having failed to assign uncertainty in the complaint as a ground of objection by demurrer, that objection was waived and cannot here be considered. (*San Joaquin Lumber Co. v. Welton et al.*, 115 Cal 1, [46 Pac. 735, 1057].)

The judgment is affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 1088. Second Appellate District.—May 1, 1912.]

ED. A. SEARS, Respondent, v. JOHN F. DOUTHITT, and
THE HERBERT BUILDING COMPANY, a Corpora-
tion, Appellants.

CONFLICTING CLAIMS TO LAND—PLAINTIFF A BONA FIDE PURCHASER FROM COMMON GRANTOR, WITHOUT NOTICE OF PRIOR UNRECORDED DEED.—In an action to determine conflicting claims to land, where the plaintiff and the defendants claim title under a common grantor, but it appears that plaintiff was a *bona fide* purchaser for value, under a recorded deed, without notice of a prior unrecorded deed, under which the defendants claim title, it is held that the evidence is amply sufficient to sustain the subsequent title of the plaintiff, as such *bona fide* purchaser.

ID.—SUFFICIENT DELIVERY OF DEED TO PLAINTIFF—DELIVERY TO BANK AS AGENT OF PLAINTIFF.—The delivery of the deed to the plaintiff, after the payment of the money to the common grantor, was suffi-

ently proved by its directed delivery to a specified bank as the agent of the plaintiff. Such bank could not have relinquished the deed upon request of the grantor without rendering itself liable to any damage sustained by the plaintiff because of such act. The deed so delivered was as effectual as though the grantor had handed it to the plaintiff, or to any other person authorized by plaintiff to receive it.

APPEAL from a judgment of the Superior Court of San Diego County. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

C. N. Andrews, for Appellants.

Chas. S. Conner, for Respondent.

JAMES, J.—Action brought to determine conflicting claims to real property. Plaintiff and defendants deraign their asserted title from one Elgin L. McBurney as a common grantor. In July, 1898, James Story was indebted to the law firm of McBurney & McBurney, all of the parties being residents of New York City, on account of legal services rendered to him by said firm. Not being able to satisfy the debt in cash at that time, Story stated to the McBurneys that he owned some lots in California valued at about \$100 and that he would give a deed to that property in payment for the services, which he did. It was agreed between the parties that if Story should pay the amount due from him on account of attorney's fees within a year the real estate would be deeded back to him, and a deed of reconveyance was then prepared and placed among the office files of McBurney & McBurney to be delivered to Story within a year if he should satisfy the condition of payment. The deed from Story was made to Elgin L. McBurney as grantee. In the month of September, 1900, Story paid the amount which had been owing from him to the firm of McBurney & McBurney to H. D. McBurney, a member of the firm, who thereupon delivered the deed of reconveyance heretofore mentioned. The deed from Story to Elgin L. McBurney had been duly recorded in San Diego county, where the real property was located, but the deed of reconveyance was not recorded until December 11, 1908. Meanwhile Elgin L. McBurney was not informed that his brother had delivered the deed of reconveyance, and in 1908, assuming that he held

title to the real property, he negotiated with plaintiff for the sale of his interest therein. After some correspondence had passed between the parties Elgin L. McBurney wrote to the plaintiff as follows: "I will give you a quitclaim deed for whatever interest might appear to be in my name for the sum of seventy-five dollars. If you care for such a deed upon this basis, prepare the same and send to me for execution." Plaintiff made out a deed agreeable to this offer and delivered it to the cashier of the San Diego Savings Bank with instructions to send the same, together with a draft for \$75, to the Fourth National Bank in New York City with instructions to the latter to deliver the draft to McBurney when he should sign the deed. On or about the third day of September, 1908, McBurney went to the Fourth National Bank in New York City, signed the deed and received the draft for \$75. This deed was returned to San Diego and delivered to plaintiff, who caused the same to be recorded on September 11, 1908, in the office of the county recorder at San Diego. Meanwhile Elgin L. McBurney discovered by an examination of memoranda in his office and consultation with his brother that a deed had been delivered to Story in the year 1900. He thereupon wired to plaintiff, directing him not to record the deed last given, as a prior deed had been discovered, and also notified the San Diego Savings Bank to hold the same deed and not to deliver it to plaintiff. This telegram to the San Diego bank was received there before the bank had delivered the deed to the plaintiff, and consequently before that deed had been recorded. The trial court found that plaintiff was the owner in fee of the real property; that he was a *bona fide* purchaser for valuable consideration without notice of any outstanding claims arising from any previous deed from Elgin L. McBurney, or otherwise. If the San Diego Savings Bank and its correspondent, the Fourth National Bank of New York City, acted as the agents of plaintiff in receiving the deed and transmitting and paying over the \$75 paid as the purchase price of the interest of McBurney in the real property, then delivery of the deed from McBurney to the plaintiff was complete when McBurney executed the same at the Fourth National Bank in New York City and received the \$75 sent to him by plaintiff. Assuming the relation of principal and agents to have existed as just mentioned, then the moment McBurney executed the deed and received the money in New

York City he became divested of any title or interest held by him in the real property, and plaintiff became the owner thereof. It is conceded by counsel for appellant that such would be the legal situation resulting from the facts just assumed, and it is conceded that the conveyance of the interest of McBurney to the plaintiff under such conditions would be superior to the title attempted to be conveyed by the unrecorded deed delivered in the year 1900 by the McBurneys to Story. There was no evidence heard, so far as the bill of exceptions discloses, which would indicate that plaintiff at the time the deed from McBurney was signed and delivered at the Fourth National Bank in New York City, had any knowledge or information as to the unrecorded deed to Story having been made, and he in his testimony affirmatively asserted that he had no such knowledge or information. The evidence was amply sufficient to justify the finding of the trial court that plaintiff was the *bona fide* purchaser without notice of the adverse claims of these defendants. And it must be said, too, that the Fourth National Bank in New York City and the San Diego Savings Bank acted together as the agents of the plaintiff, and not as the agents of Elgin L. McBurney. In a letter dated August 24, 1908, the plaintiff wrote to McBurney that he was sending the deed and draft for \$75 as required. He then added: "You will find them the Fourth National Bank of N. Y. Sign deed and draw your money." After having delivered the \$75 to McBurney, and having received the deed duly executed by the latter, the Fourth National Bank of New York City could not have relinquished the deed upon request of McBurney without rendering itself liable for any damage sustained by this plaintiff because of such act. When McBurney delivered his deed to the bank in New York he delivered it just as effectually as though he had then handed it to plaintiff himself, or any other person authorized by plaintiff to receive it. Therefore, any notices given by McBurney to either of the banks acting as transfer agents for plaintiff after the deed had been delivered in New York were ineffectual to prevent the passing of title to the property from McBurney to the plaintiff. The evidence does sustain all of the findings made by the trial court and the judgment which followed them.

The judgment is affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 1107. Second Appellate District.—May 1, 1912.]

R. H. HERRON COMPANY, a Corporation, Respondent, v. WESTSIDE ELECTRIC COMPANY, a Corporation, et al., Defendants; KERN RIVER MINING AND POWER COMPANY, a Corporation, Appellant.

FOREIGN CORPORATION—UNAUTHORIZED JUDGMENT BY DEFAULT—DOING BUSINESS IN STATE NOT SHOWN—SERVICE OF SUMMONS UPON PRESIDENT.—In an action against a foreign corporation, where the complaint shows that it is a foreign corporation, authorized by its charter to own stock in other corporations, and judgment was sought against it upon its statutory liability as a stockholder in a corporation organized under the laws of this state, but where neither the complaint nor the affidavit of service of summons upon its president shows that it is doing business in this state, or that it had a managing agent, cashier or secretary within the state, upon whom service of summons can be made, it was insufficient to support a clerk's judgment by default, under section 411 of the Code of Civil Procedure.

ID.—EFFECT OF OWNERSHIP OF SHARES IN DOMESTIC CORPORATION—"DOING BUSINESS IN STATE"—PRESIDENT NOT PRESUMED "MANAGING AGENT."—If it be conceded that the effect of the ownership of shares by a foreign corporation in a domestic corporation, organized under the laws of this state, constitutes a "doing business" by such foreign corporation in this state, it does not follow that the president of such foreign corporation who is served with summons shall be presumed to be the managing or business agent of such foreign corporation.

ID.—CLERK'S ENTRY OF DEFAULT JUDGMENT—MINISTERIAL DUTY—PRESUMPTION OF OTHER PROOF NOT INDULGED.—Where a default judgment is entered by the clerk, there is no such presumption of other proof as would attend such a judgment ordered by the court. The clerk's duty in entering a judgment by default is ministerial, and not judicial in its nature.

ID.—SUPPLEMENTAL AFFIDAVIT FILED LONG AFTER PERFECTING APPEAL NO PART OF RECORD.—A supplemental affidavit filed long after the perfecting of this appeal constitutes no part of the record to which the appellate court is entitled to look in determining the question presented by the record.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

S. S. Sanders, for Appellant.

O'Melveny, Stevens & Millikin, and Walter K. Tuller, for Respondent.

JAMES, J.—This is an appeal taken by defendant Kern River Mining and Power Company from a judgment entered against it by default. Plaintiff instituted the action to recover against the Westside Electric Company various sums of money for merchandise sold by it and several other vendors whose claims were assigned to plaintiff prior to the commencement of the action. Judgment was sought against appellant upon its statutory liability as a holder of shares of stock of the Westside Electric Company. In the complaint it was alleged that appellant was a corporation organized and existing under the laws of the territory of Arizona and authorized by its articles of incorporation to subscribe for, own and hold stock in other corporations. It was not alleged that appellant was doing business in the state of California at the time of the service of summons, or at all, or that it had a managing agent, cashier, or secretary within this state. The affidavit purporting to show service of summons recited that the person making the service had "on the twenty-ninth day of August, 1910, personally served summons in said action upon defendant Kern River Mining and Power Company, in said county of Los Angeles, state of California, by then and there delivering to and leaving with H. C. Shippe, an officer of said defendant, to wit, the president thereof, personally, another and separate copy of said summons annexed to another and separate copy of the complaint in said action." Among other contentions made by appellant on this appeal, it is urged that the affidavit was insufficient to confer jurisdiction to enter the judgment. Section 411 of the Code of Civil Procedure provides how summons must be served in order that jurisdiction be acquired against a foreign corporation. Subdivision 2 of that section reads as follows: "2. If the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state; to such agent, cashier, or secretary." It was not made to appear either in the complaint of plaintiff or the affidavit of the person making the service of summons that the appellant at the time such sum-

mons was served upon its president, was engaged in any business in the state of California, or that it had in this state a managing or business agent, cashier, or secretary upon whom service of summons could be made. In *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, [84 Pac. 289], where a like question was under consideration, the court said: "Under the provisions of this section, in order that the court may get jurisdiction over a foreign corporation, it is requisite that such corporation shall be 'doing business' within the state at the time the summons is served, and that the service shall be made upon its agent who is managing that business, or upon its cashier or secretary." Even though it might here be said that because the appellant was at the time of the attempted service of summons the holder of a large number of shares of stock of the Westside Electric Company, a California corporation, it was then "doing business" within the meaning of the section of the code referred to, still it does not by any means follow that the president of a foreign corporation who is served with process within this state shall be presumed to be the managing or business agent of such foreign corporation. In our opinion, the affidavit of service was insufficient to show that the requisite jurisdiction had been acquired to authorize the entry of the default judgment.

The judgment is reversed.

Allen, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 31, 1912, and the following opinion then rendered thereon:

THE COURT.—The argument made by respondent in its petition for rehearing would be pertinent had the default judgment appealed from been one which was entered by the court. In that case it would be presumed that all of the necessary facts as to the service of summons had been made to appear. The judgment-roll here exhibited shows that the clerk entered judgment upon an insufficient affidavit of service of summons, and we cannot assume that there was any other proof made of such service. The clerk's duty of entering a default judgment is a ministerial one and not judicial in its nature. The supplemental affidavit filed long after the per-

fecting of this appeal can constitute no proper part of the record to which we are entitled to look in determining the question presented.

Rehearing is denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 28, 1912.

[Civ. No. 1119. Second Appellate District.—May 8, 1912.]

FRANK CRAYCROFT, JR., Petitioner, v. **SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF KERN,** and **HON. J. W. MAHON,** Judge of Said Superior Court, Respondents.

STATE SCHOOL LANDS—LIMITATION OF TIME FOR CONTEST—FIVE YEARS FROM ISSUANCE OF CERTIFICATE.—Under the provisions of section 3499 of the Political Code, as amended March 13, 1911, the superior court is divested of jurisdiction to hear and determine a contest for state lands, unless such contest shall be filed, heard, determined, referred or allowed, within five years from and after the date on which such certificate of purchase may have been issued.

ID.—CODE AMENDMENT RETROACTIVE.—The provisions of section 3499 of Political Code as amended in 1911 are expressly made applicable to all cases; and there is a clearly expressed intention that that section should act retroactively, and bar all previously issued certificates unless heard and determined within five years from the date of the issuance of the certificate. The mere application to purchase, without payment of money, vests no rights in the applicant, and that section cannot be said to impair the obligation of any contract, or to be destructive of any vested rights or interests.

ID.—WANT OF JURISDICTION OF SUPERIOR COURT—PROHIBITION—REMEDY BY APPEAL—ADEQUACY—DISCRETION OF PROHIBITING COURT.—Since the superior court is divested of jurisdiction to hear and determine a contest of a certificate of purchase after the lapse of five years from its date, a writ of prohibition will lie to restrain it from exercising such jurisdiction, notwithstanding a possible remedy by appeal from its judgment without jurisdiction. The question whether such remedy is adequate is matter within the sound discretion of the court granting the writ.

APPLICATION for writ of prohibition to the Superior Court of the County of Kern. **J. W. Mahon,** Judge.

The facts are stated in the opinion of the court.

Miles Wallace, and L. L. Cory, for Petitioner.

F. A. Stephenson, Alfred Daggett, Frank Kauke, and T. M. McNamara, for Respondents.

J. R. Dorsey, Geo. E. Whitaker, and T. N. Harvey, for Robert L. Perry, Party in Interest.

Hatch, Lloyd & Hunt, *Amici Curiae*.

ALLEN, P. J.—It appears from the verified petition filed herein that on the third day of October, 1901, the register of the state land office at Visalia, upon the payment of twenty per cent of the purchase price and interest, issued to one Samuel Brown a certificate of purchase for a certain section of school land then owned by the state and subject to sale; that on the day ensuing Brown transferred and set over said certificate to petitioner; that said certificate was duly recorded; that petitioner has made payment in full to the state for said land and all interest, taxes and costs of every kind, nature and description; that thereafter on October 6, 1910, one Kerr filed his application with the surveyor general, contesting the application of said Brown to purchase the said land, with a demand that the conflicting claims be referred for adjudication; that on the same day an order was entered by the surveyor general referring the contest of Kerr and Brown to the superior court of Kern county for trial and adjudication; that on November 3d Robert L. Perry made application to purchase the north half of said section, contesting also the purchase rights of Brown; that on November 10th one Spencer made application to purchase the north half of said section. That neither said Kerr nor said Brown, within sixty days after the order of reference, commenced any action in the superior court of Kern county with reference to said adjudication; that on December 7, 1910, one Chittenden filed his application for the purchase of the whole of said section, contesting the rights of all parties before named, and asking that the conflicting claims be referred to the superior court; that on December 7, 1910, after the filing of such application by said Chittenden, Kerr filed his application to purchase all

of said section, together also with another contest and protest against the application of Brown; that on December 31, 1910, one Charles Smithwick filed his application for the purchase of the south half of said section. That on the thirteenth day of January, 1911, an order was made by the said state surveyor general and the register of the state land office, as follows: "It is therefore ordered and directed, that the contest as set forth between the above-named R. D. Chittenden and Samuel Brown, be and the same is hereby referred, together with the conflicting claims of John P. Kerr, Robert L. Perry, Richard V. Dorsey, Charles Smithwick and Emmet L. Spencer, and of each of them, to the Superior Court in and for the County of Kern, State of California, for adjudication." That none of the applications of contesting claimants have ever been allowed or approved in any manner by the surveyor general, and that neither of said parties has paid any portion of the purchase price of the land referred to; that thereafter, on February 21, 1911, an action was commenced in the superior court of Kern county by Emmet L. Spencer against Brown and the other claimants, based upon the order of reference above referred to, praying for an adjudication that the application of said Brown be held illegal and void, and that the certificate of purchase so assigned and held by petitioner be likewise held illegal and void, and that Spencer's application be adjudged and declared a valid application for the purchase of said land; that thereafter petitioner demurred to the complaint and moved to dismiss said action upon the ground that the court had no jurisdiction to hear and determine the same, which said demurrer and motion to dismiss were overruled and denied. It is averred that the said superior court intends to and will, unless restrained by this writ of prohibition, proceed to the trial of said action and thus impose upon petitioner great costs and expense in the defense thereof; that the court has been divested of jurisdiction to hear and determine said action; that petitioner is a laboring man without means, and in order to properly present his defense it will be necessary, at great expense, to bring witnesses from a distance; that such trial will occupy many days or weeks, at much expense; that said land is of little value, except for the oil which it contains and such value is problematical; and accordingly this writ of prohibition is prayed for.

It is contended by petitioner that, notwithstanding the provisions of the constitution of this state, which provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law," the issuance of the certificate to Brown for six hundred and forty acres was an adjudication by a competent authority that the lands involved were not suitable for cultivation. This upon the assumption that a public officer performs his duty, and *prima facie* the lands were subject to sale in quantities exceeding three hundred and twenty acres in area, and, further, that the action sought to be maintained upon the order of reference was not brought within the time provided by statute; and, further, that under section 3499 of the Political Code, as amended March 13, 1911, [Stats. 1911, p. 345], the court is divested of jurisdiction to hear and determine the contest, or adjudicate with reference to said lands. This section as amended in terms provides that no contests of the character here mentioned, or made under any section of the code, "of any location or application to purchase any state school lands which have heretofore been, or shall hereafter be made and filed with the surveyor general or register of the state land office, or of any order of approval made thereof, or of any certificate of purchase issued thereon or pursuant thereto by such surveyor general or register, shall be filed, heard, determined, referred or allowed, unless such contest shall have been or shall be so filed, heard, determined, referred or allowed as provided in said sections of this code, within five years from and after the date on which such certificate of purchase may have been issued." Section 3495 of the Political Code specifies the matters and things which must be set forth and established by one desiring to purchase lands of the state, as a condition precedent to the issuance of a certificate of purchase, among which it is required that it must be made to appear whether or not the land is suitable for cultivation, upon the filing of which proof depends the right of the officers to issue the certificate of purchase for an amount of land in excess of three hundred and twenty acres. "The presumptions that the law has been obeyed, that the first applicant is innocent of the crime of perjury, and that official duty has

been properly performed, come to the aid of the defendant. In the absence of controverting proof these presumptions will prevail. The certificate is made *prima facie* evidence of title in the holder." (*Bieber v. Lambert*, 152 Cal. 564, [93 Pac. 97].) While these presumptions may be overcome by proving that the facts are otherwise, it is nevertheless necessary in order to admit such proof that a contest must be initiated, a reference made and a court with jurisdiction to hear and determine the controversy. Prior to the act of 1911 above referred to, it was not necessary that a contestant should show any right in himself to purchase, nor connect himself with any claim to the land. (*Garfield v. Wilson*, 74 Cal. 175, [15 Pac. 620].) Nor was there a limitation of time within which the contest should be inaugurated, or the action tried and determined. "The jurisdiction of the superior court in actions begun in pursuance to a reference to it of a contest arising in the surveyor general's office over the right to purchase state land is special and limited. It is derived solely from the provisions of the Political Code relating to such contests. The sole object to be achieved by the trial before the superior court is a determination of the question of the rights of the two parties between whom the contest arose in the surveyor general's office to purchase the particular tract of land in question." (*Youle v. Thomas*, 146 Cal. 541, [80 Pac. 715].) This right of contest is by the plain terms of section 3499, as amended, restricted to a period of five years after the issuance of the certificate, and by said section the determination of the questions presented under the order of reference is restricted to contests commenced within such period. If, then, section 3499 is to be construed as operating retroactively, the court was by force of such act divested of jurisdiction to further hear or determine the contest so sought to be initiated. As said by our supreme court in *Baird v. Monroe*, 150 Cal. 565, [89 Pac. 354], in construing the retroactive character of a statute under the rule that such effect should not be given unless the legislative intention that it shall so operate is clearly apparent: "It is impossible to read carefully the statute in question, however, without coming to the conclusion that it was intended to so operate." It will be observed that the section here under consideration not only restricts the right of contest, the filing thereof and the reference, but

makes the same applicable to all cases, unless such contest shall have been or shall be "determined within five years from and after the date on which such certificate of purchase may have been issued." We think that here is a clearly expressed intention that this section should act retroactively, and the effect of which in the case at bar could only be to divest the superior court of Kern county of all jurisdiction to hear and determine the controversy between the parties. This statute was intended to settle all disputes as to the validity of the purchase after the expiration of five years, and to render as conclusive the presumption attaching to the issuance of the certificate in the first instance. The mere application to purchase without payment of money vests no rights in such applicant, and such section cannot be said to impair the obligations of any contract or to be destructive of any vested rights or interests.

It is insisted, however, by respondents that, assuming everything hereinbefore said to be the law, nevertheless prohibition will not lie because the right of appeal from any decision made by the court is speedy and adequate. The solution of this question is not without difficulty. An apparent conflict seems to exist in this state as to the right to the writ where an appeal will lie, and it has been determined in *Lindley v. Superior Court*, 141 Cal. 220, [74 Pac. 765], that it is not sufficient ground for intervention by prohibition that the trial be expensive and troublesome. This rule, however, to a certain extent, has been modified in instances where costs necessary in the prosecution of the case would have to be incurred which could not be included in a bill therefor, and in *Hayne v. Justice's Court*, 82 Cal. 284, [16 Am. St. Rep. 114, 23 Pac. 125], it is said: "A court that proceeds in the trial of a cause against the express prohibition of a statute is exceeding its jurisdiction, and may be prevented from doing so by prohibition from this court." This authority is approved in *Clide v. Superior Court*, 147 Cal. 28, [81 Pac. 225], and it seems to us that it is proper to grant the writ in instances where it is evident from the record that any order or judgment made by the court would be ineffective. Mr. Justice Shaw in his concurring opinion in the case last cited says: "The question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in

the sound discretion of this court upon the particular circumstances of each case." The authority, then, to grant the writ in this case seems to us to be warranted under such discretionary power. It were idle for this petitioner to be required, at large costs and expense upon a trial, to establish that which must be conclusively presumed. That the trial court in this instance has overruled the demurrer, has denied the motion to dismiss, and has assumed jurisdiction in a case wherein we think it has been divested of jurisdiction, we regard as presenting a proper case in which, in the exercise of our discretion, to direct the issuance of the writ of prohibition.

The writ is, therefore, ordered as prayed for.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 2, 1912.

[Civ. No. 1092. Second Appellate District.—May 4, 1912.]

C. L. CONNER, Respondent, v. H. A. BLODGET, Appellant.

ACTION UPON NOTE—AGREEMENT TO PAY "ATTORNEYS' FEES WHICH MAY BE INCURRED IN COLLECTION"—AVERMENT OF REASONABLE FEE —NEGATIVE PAYMENT.—In an action upon a note under an agreement to pay "attorneys' fees which may be incurred in the collection of this note," where the complaint averred that "five hundred dollars is a reasonable fee to be allowed plaintiff as attorneys' fees in the collection of said note and the prosecution of this suit," and the defendant merely denied "that five hundred dollars is a reasonable fee to be allowed the plaintiff as attorney's fee in the collection of such note and prosecution of this suit, or otherwise or at all," such denial admitted that any fee under \$500 was reasonable. In this state of the pleadings, the court was authorized to allow \$300 as a reasonable fee.

ID.—UNNECESSARY ALLEGATION AND PROOF—EXPRESS AGREEMENT TO EMPLOY AND PAY PLAINTIFF.—It was not incumbent upon the plaintiff to allege and show by express proof that an attorney had been employed, and that an agreement had been made to pay him, before the court was authorized to make an allowance for attorneys' fees as having been "incurred" by the plaintiff.

ID.—PROPER FOUNDATION IN RECORD FOR ALLOWANCE OF FEES BY COURT —EXPERT EVIDENCE NOT REQUIRED.—Where the record shows that plaintiff's action was brought by an attorney at law, who signed the complaint, alleging reasonable attorneys' fees, and who also appeared in court, and presented a motion for judgment upon the pleadings, which was granted, the court was authorized, when the nature and extent of the services rendered by the plaintiff were made to appear from the papers and proceedings had, or by other evidence, to fix such an amount as would be a reasonable compensation for such services, without hearing any expert evidence thereon.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

E. L. Foster, for Appellant.

George E. Whitaker, for Respondent.

JAMES, J.—This is an action brought upon a promissory note executed by defendant which contained the agreement of appellant to pay, in addition to the principal sum and interest, "all legal expenses and attorney's fees which may be incurred in the collection of this note." Plaintiff set out in his complaint the note *in haec verba*, alleged the nonpayment of the balance due thereon, and with reference to the matter of attorney's fees alleged as follows: "That five hundred dollars is a reasonable fee to be allowed plaintiff as attorney's fees in the collection of said note and prosecution of this suit." To this complaint defendant filed an answer which contained only the following denial: "Denies that five hundred dollars is a reasonable fee to be allowed the plaintiff as attorney's fee in the collection of said note and prosecution of this suit in any manner, or otherwise, or at all." This being the state of the pleadings, a motion was made on behalf of plaintiff for judgment without trial, which motion was granted by the court, and judgment was thereupon entered for the amount of principal and interest due, together with \$300 as attorney's fees and costs. Defendant on this appeal taken from that judgment makes the contention that under the allegations of the complaint it was not shown that any attorney's fees had been incurred, and that therefore there was no jurisdiction in the court to award to the plaintiff judg-

ment for any amount on that account. By his answer defendant denied only that the amount of \$500 was a reasonable attorney's fee to be allowed. The denial in that form admitted, of course, that any sum less than \$500 was a reasonable fee, and the court by its judgment found the sum of \$300 to be a reasonable fee, which was an amount within that admitted by appellant to be reasonable. In the case of *Prescott v. Grady*, 91 Cal. 518, [27 Pac. 755], the denial there made by the defendant to a like demand was "that seventy-five dollars, or any other sum, is a reasonable attorney's fee." In that case the court said: "We think, under this answer, defendant could have shown either that plaintiff was not entitled to any fee, as in *Bank of Woodland v. Treadwell*, 55 Cal. 379, or could have been heard as to what would have been a reasonable fee; and perhaps might have made some other defense." The denial made in that case by the defendant covered every amount asserted by the complaint to be a reasonable fee, which the denial here, as we have pointed out, did not do. Neither do we think that it was incumbent upon the plaintiff to allege and show by express proof that an attorney had been employed and an agreement had been made to pay him before the court was authorized to make an allowance for attorney's fees as having been "incurred" by the plaintiff. As affecting that question, the facts in this case are very similar to those disclosed by the opinion in the case of *Alexander v. McDow*, 108 Cal. 25, [41 Pac. 24]. There the note provided that there should be paid "ten per cent of total amount due for attorney's fees incurred in the collection of this note, when collection is made by attorney or other officer." In that case the complaint contained no allegation that attorney's fees had been incurred, and the court said: "We think, also, that there is sufficient in the complaint to support the allowance of attorney's fees. The note, which is set forth in full, provides for them, and the prayer of the complaint asks for them, and the action is brought by an attorney at law. The sum asked as attorney's fees is susceptible of exact determination by simple mathematical calculation. It is fairly deducible from the complaint, therefore, that plaintiff asks an allowance of a specific sum as being reasonable and due for attorney's fees under the contract. It is true that this demand is in the nature of special damages, the allowance of which might have

been contested by defendant. (*Prescott v. Grady*, 91 Cal. 518, [27 Pac. 755].) But his default admits the truth of the matters pleaded, and must, therefore, be construed to admit that the amount claimed is both reasonable and due. Thus no evidence was required to be taken for the purpose of fixing that amount." It appears from the record in this case that the action was brought by an attorney at law, who signed the complaint and also appeared in court and presented the motion for judgment on the pleadings. The court was authorized, when the nature and extent of the services rendered by the attorney were made to appear from the papers and proceedings had, or by other evidence, to fix such an amount as would be a reasonable compensation for such services without hearing any expert evidence thereon. (*Spencer v. Collins*, 156 Cal. 298, [20 Ann. Cas. 49, 104 Pac. 320].) For the reasons stated, we think that under the pleadings the judgment as entered by the court was fully authorized.

The judgment is affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 3, 1912.

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ACCIDENT INSURANCE. See Insurance, 1-4.

ACCOUNT.

1. **MUTUAL, OPEN AND CURRENT ACCOUNT—ASSIGNABILITY—HUSBAND AND WIFE—CONDUCT OF BUSINESS—POWER OF ATTORNEY—INSUFFICIENT DEFENSE.**—A mutual, open and current account, like an ordinary account, is property consisting of a chose in action, which is the subject of transfer, sale or assignment, or reassignment. A husband who, in the course of his business, has acquired such an account, may assign and transfer his business, including such account, to his wife, under a recorded instrument, and may, under her power of attorney, continue the business for her in the same manner as before such assignment, and she may thereafter reassign said account to her husband, who may sue thereon as her assignee; and it is no defense that the last items on the debit side of the account were not contracted with the wife personally, and that all transactions were between the husband and the debtor sued. (*Culver v. Newhart*, 614.)
2. **ABSENCE OF VARIANCE—PROOF CORRESPONDING TO ALLEGATIONS.**—Where the complaint against the debtor sets forth all of the facts, including the assignment made by the husband to the wife, and the reassignment from the wife to the husband, and alleges that at the time of the reassignment the defendant was indebted to the wife in a certain sum on a certain "open, current and mutual account," and that on the date of the reassignment she sold and assigned said account to the plaintiff, and the evidence shows that on that date there was due her on said account the specified balance, if it appears from the evidence that the account was of the character alleged, there is no variance. (*Id.*)
3. **SUPPOSITION OF STATED ACCOUNT—ISSUE AS TO "MUTUAL, OPEN AND CURRENT ACCOUNT"—IMMATERIAL VARIANCE—STATUTE OF LIMITATIONS WAIVED.**—Assuming that the evidence shows the account to be a stated account, and not "mutual, open and current," within the meaning of section 344 of the Code of Civil Procedure, still the variance arising by reason thereof would be immaterial under section 469 of the Civil Code, because the defendant could not be actually misled thereby to his prejudice, since he does not deny the existence of the account, but merely joined issue as to whether the account was "mutual, open and current," and it is immaterial whether the account was stated or mutual, as the statute of limitations was not pleaded, and that defense is waived. (*Id.*)

ACCOUNT (Continued).

4. **ACCOUNT "MUTUAL, OPEN AND CURRENT"—MATTERS OF SETOFF.**—The account in question is in its nature a "mutual, open and current account" within the contemplation of section 344 of the Code of Civil Procedure, since the credit side of the account besides one cash payment and several orders on others, had five items for lumber sold and delivered to the plaintiff as the original owner of the account by the defendant, thus consisting of matters of setoff *pro tanto*, which constituted the account "open, as contradistinguished from an account stated." Mutual accounts are made up of matters of setoff. (Id.)
5. **EVIDENCE OF RENTAL VALUE OF PLANER—KNOWN TERMS OF PRIOR LEASE—SUPPORT OF FINDING.**—A charge to the defendant of \$20 per month for the rental value of a planer, which had been before leased by plaintiff to a third party at that rental, to the knowledge of the defendant, and to which rental the defendant in practical effect succeeded, is properly considered as evidence of the reasonable rental value of the planer, and in the absence of any evidence to the contrary, it is sufficient to support a finding of such rental value of the use of the planer against the defendant. (Id.)
6. **PROPER EVIDENCE OF THIRD PARTY AS TO PRIOR RENTAL AND DELIVERY OF PLANER.**—The court properly allowed the evidence of such third party to show the monthly rate of rental previously paid by him for the use of the planer for a year and a half, and that he transferred the possession thereof to the defendant. (Id.)
7. **LOST POWER OF ATTORNEY—SECONDARY EVIDENCE—GENERAL POWER—SUPPORT OF FINDING—ABSENCE OF PREJUDICIAL ERROR.**—Where the power of attorney executed by the wife to the husband was shown to have been lost, and not to have been found after diligent search, secondary evidence was admissible to show that it was a general power of attorney, authorizing him to transact all kinds of business in her name, and to collect the accounts and dispose of the property that had been assigned to her, and was sufficient to support a finding to that effect; and it is held that no error prejudicial to the defendant was committed in rulings upon questions and answers relative to such evidence. (Id.)
8. **EVIDENCE—BILL OF SALE FROM HUSBAND TO WIFE—BUSINESS "ACCOUNTS AND INDEBTEDNESS"—PAROL EXPLANATION—ACCOUNT IN QUESTION.**—The bill of sale made by the plaintiff, as husband, to his wife, purporting to convey to her all of his business, personal property, and "accounts and indebtedness" due to him, was properly admitted in evidence; and the plaintiff properly testified and was entitled to show, if the bill of sale is ambiguous in that respect, that the account here in question was included in the "accounts" sold and delivered to her. (Id.)

ACCOUNTING.

1. **ACTION FOR PARTNERSHIP ACCOUNTING—CORPORATIONS USED AS INSTRUMENTALITIES—GIFT OF STOCK BY DECEASED PARTNER TO HEIRS.—EQUITY JURISDICTION AND RELIEF.**—A complaint in an action for an accounting and settlement of a partnership between plaintiff and one of the defendants and a deceased partner, which shows that the corporation defendant and another corporation named were used as instrumentalities of the partnership in carrying on construction work for the United States, and that the deceased partner is largely indebted to the partnership, but had caused his shares of stock in such corporation to be transferred to his heirs as a gift *causa mortis*, states a ground for relief in equity as against such administrator and heirs, and they may be restrained from disposing of such stock pending the settlement of the partnership accounts. (*Raisch v. Warren*, 655.)
2. **VENUE OF EQUITY ACTION—PRESUMED PROCEDURE UPON JUDGMENT.** Such action in equity for an accounting of the partnership may be brought and tried in the superior court of a county other than that in which the estate is being administered. But if, upon the trial, anything is found due from the estate, it is to be presumed, if no ground in equity appears for a different procedure, that the court would be guided by section 1504 of the Code of Civil Procedure, in formulating its judgment, whereupon a certified transcript of the original docket of the judgment would be filed among the papers of the estate in the county in which the estate is being administered. (Id.)
3. **JURISDICTION OF SUPERIOR COURTS IN EQUITY COEXTENSIVE.**—All of the superior courts have like original jurisdiction "in all cases in equity," and their process extends "to all parts of the state." The superior court of the city and county of San Francisco has the same jurisdiction in equity as the superior court of Alameda county, in which the estate is being administered; and if the action in equity could be maintained in the latter county, there is no reason why it may not be prosecuted in the former. So far as jurisdiction in equity is concerned, the two counties stand upon the same footing. (Id.)
4. **QUESTION OF CHANGE OF VENUE—RIGHT TO BRING ACTION IN ANOTHER COUNTY UNAFFECTED.**—Even if the right should exist to have the action in equity tried in Alameda county, such right is not to be confounded with the right to bring the action in the superior court of the city and county of San Francisco. (Id.)
5. **POWER IN EQUITY TO ENFORCE RELIEF—PARTIES BEFORE COURT—INJUNCTION AGAINST DIVERSION OF STOCK—POWER NOT LIMITED BY PROVISION FOR JUDGMENT.**—Where the action in "equity" involves the assumption that the estate of plaintiff's deceased copartner will be shown to be indebted to plaintiff and his assignor, another

ACCOUNTING (Continued).

copartner, on a fair accounting, in a large sum of money, that the inventoried estate is wholly insufficient to meet the claim, and that the administrator and heirs who are before the court have possession of corporate stock of great value, which rightfully belongs to the estate, and should be applied to the judgment upon such accounting, and that its diversion therefrom should be enjoined, it cannot be maintained that such scheme must collapse and the injunction must fall, by the limitation of the court's power under section 1504 of the Code of Civil Procedure. The court's power in equity is not limited by that section. (Id.)

6. **POWER OF EQUITY TO MAKE RELIEF COMPLETE—ORDER FOR SALE OF STOCK AND DISPOSAL OF PROCEEDS.**—When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case. It may order the sale of the shares of stock which have been wrongfully placed in the custody of the administrator and heirs, and their proceeds applied to the payment of the creditors of the estate, including the plaintiff, when his claim to payment is established; or it may order the administrator, who is a party defendant before the court, to take possession of such shares of stock, and to sell the same and apply the proceeds to the payment of creditors of the estate. The court will not be left with its hands tied, without power to make any disposition of the stock to satisfy the plaintiff's claim. (Id.)
7. **NATURE OF ACTION—NOT A CREDITOR'S BILL—PARTNERSHIP ACCOUNTING—INCIDENTAL RELIEF.**—The action cannot be strictly called a creditor's bill; but it is an action in equity for an accounting of the affairs of a partnership, which the administrator has no power to adjust, and incidentally to cause property belonging to a deceased partner to be subjected to administration for the benefit of plaintiff, as a creditor, and other creditors of the estate. The fact that at the beginning of the action the plaintiff's claim was not reduced to judgment cannot preclude incidental equitable relief to prevent the diversion of such property, which the administrator and heirs wrongfully claim as their own, since if the plaintiff was deprived of access thereto, he would be remediless. (Id.)
8. **LIMITED POWER OF PROBATE COURT—RELIEF IN EQUITY COURT.**—The superior court sitting in probate cannot go into an accounting of a copartnership, nor determine the ownership of shares of stock which are as yet no part of the estate, and in respect of which the administrator refuses to take steps necessary to determine their ownership. The equity court alone can and will afford relief where the powers of the probate court are inadequate to do justice. (Id.)
9. **INJUNCTION JUSTIFIABLE—DISCRETION.**—The injunction was justifiable where the facts show that by no other means could the property have been preserved to await the result of the accounting.

ACCOUNTING (Continued).

Where an injunction is justifiable, the issuing of the writ is, in a large degree, a matter of discretion, which should be exercised in favor of the party most likely to be injured. (Id.)

ACT OF GOD. See Building Contract, 4.

ADOPTION. See Parent and Child; Specific Performance, 1-10.

AFFIDAVIT OF MERITS. See Judgment, 11; Place of Trial, 5.

AGENCY. See Assignment, 1, 5, 7; Brokers; Corporation, 4-8; Fraud, 1-6.

ALIMONY. See Contempt, 1.

APPEAL.

1. **ABSENCE OF ARGUMENT—AFFIRMANCE OF JUDGMENT.**—Where no briefs have been filed by either party, and no oral argument was made when the case was regularly called upon the calendar, the judgment will be affirmed. (Delger v. Jacobs, 698.)
2. **MOOT QUESTION—REVIEW UPON APPEAL FROM ORDER—DISMISSAL.**—This court will not review an appeal from an order which involves a mere moot question, in view of its conclusions upon the merits of the case, but the appeal from such order will be dismissed. (S. M. Bernard Co. v. Higgins, 626.)
3. **APPEAL FROM JUDGMENT NOT TAKEN IN TIME—DISMISSAL.**—An appeal from the judgment not taken in time must be dismissed. (McDermott v. Catfield, 499.)
4. **SUPPLEMENTAL AFFIDAVIT FILED LONG AFTER PERFECTING APPEAL NO PART OF RECORD.**—A supplemental affidavit filed long after the perfecting of this appeal constitutes no part of the record to which the appellate court is entitled to look in determining the question presented by the record. (R. H. Herron Co. v. Westside Electric Co., 778.)
5. **APPEAL FROM ORDER CHANGING PLACE OF TRIAL—RECORD IMPROPERLY AUTHENTICATED—CERTIFICATE OF CLERK.**—Where, upon appeal from an order changing the place of trial of an action, the transcript upon appeal is entitled a "Bill of Exceptions," including affidavits, notice of motion for change of venue, demand for such change, amended complaint, demurrer thereto, order of court granting the motion and notice of appeal, which was not settled by the judge as required by rule XXIX, and no attempt was made to follow the new method of procedure, but the only authentication of the record is that of the clerk presented in the transcript, a record so au-

APPEAL (Continued).

thenticated is held wholly insufficient as a basis for this court to review the order appealed from. (*Knox v. Schrag*, 220.)

6. **PROPER PROCEDURE FOR INSUFFICIENT RECORD—AFFIRMANCE.**—It is held that the proper procedure, in such case, is not to dismiss the appeal, but to affirm the order appealed from. (*Id.*)
7. **ORDER VACATING DEFAULT JUDGMENT—HEARING UPON AFFIDAVITS—INSUFFICIENT AUTHENTICATION BY CLERK—AFFIRMANCE OF ORDER.**—An order vacating a default judgment, which was heard and determined upon affidavits, must be affirmed where the only record prepared for use upon the appeal is a purported transcript of the judgment-roll, the notice of motion to set aside the judgment, and affidavits used upon the hearing certified alone by the clerk of the trial court which cannot be considered. (*Credit Clearance Bureau v. Weary & Alford Co.*, 467.)
8. **ALTERNATIVE MODE OF PERFECTING APPEAL—CERTIFICATE OF JUDGE ESSENTIAL.**—To perfect such an appeal, the appellant must adopt either the method prescribed by sections 953a, 953b and 953c of the Code of Civil Procedure, or that prescribed by rule XXIX of the supreme court. In either of such methods, the record must be examined and authenticated by the trial judge, who knows what papers were used at the hearing. It is not for the clerk to determine what papers the court acted upon in setting aside the default judgment. (*Id.*)
9. **APPEAL FROM ORDER DENYING A NEW TRIAL—SUPPORT OF JUDGMENT BY FINDINGS NOT REVIEWABLE.**—The objection that the judgment is not supported by the findings cannot be raised upon appeal from an order denying a new trial. (*Union Collection Co. v. Rogers*, 205.)
10. **APPEAL FROM ORDER DENYING NEW TRIAL—ERRORS IN PLEADINGS NOT REVIEWABLE.**—Where there is no appeal from the judgment, but solely an appeal from an order denying a new trial, alleged error of the court in striking out a counterclaim and portions of the answer of the defendant appealing, which could only be reviewed upon an appeal from the judgment, cannot be considered upon the appeal from such order. (*Stockton Iron Works v. Walters*, 373.)
11. **EFFECT OF CODE AMENDMENT AS TO JUDGMENT-ROLL—SCOPE OF APPEAL FROM ORDER NOT ENLARGED.**—Notwithstanding the amendment of 1907 to section 670 of the Code of Procedure makes "all orders striking out any pleading in whole or in part" a part of the judgment-roll, yet such amendment does not enlarge the scope of an appeal solely taken from an order denying a motion for a new trial, upon which no question as to the sufficiency of the pleadings or findings can be reviewed; but only such matters can be considered as are made grounds of the motion, upon which the superior court may grant or deny the same. (*Id.*)

APPEAL (Continued).

- 12. REFUSAL OF LEAVE TO FILE AMENDED PLEADING—INJURY NOT MADE TO APPEAL.**—Where the defendant appealing complains that he was denied leave of the court to file a second amended answer and counterclaim, which was requested upon the granting of the motion to strike out, and the overruling of defendant's demurrer to the complaint, but he did not show at the trial, and does not show upon appeal, how he could improve his answer by amendment, no injury is made to appear by the ruling. (Id.)
- 13. REPLEVIN—FINDINGS SUPPORTING JUDGMENT—MORTGAGE RIGHTS OF APPEALING INTERVENOR—CONCLUSION OF LAW—SPECIAL FINDING NOT ESSENTIAL.**—Where in an action for the claim and delivery of personal property the findings were for the plaintiff and against defendant and the bank, intervenor, and supported the judgment against them, and was also against the appealing intervenor, who claimed as the assignee of a mortgage made on the property by a former owner, and who claimed the same rights in the personal property as affixed to the realty that were asserted by the bank, and who alleged that the bank is now the owner of the property, and the court merely found, as a conclusion of law, that such intervenor "is not entitled to take anything by reason of his complaint in intervention," and he appealed from the judgment on the judgment-roll, it is held that his claim that the judgment must be reversed for want of a special finding is without merit. (*Erving v. Napa Valley Brewing Co.*, 135.)
- 14. PRESUMPTION ON APPEAL OF INTERVENOR—ABSENCE OF EVIDENCE—WAIVER OF FINDINGS—DESEDITION OF ISSUE.**—It will be presumed on the appeal of the intervenor from the judgment, on the judgment-roll alone, that either the intervenor offered no evidence in support of the averments of his complaint in intervention, or if he did, that findings thereon were waived, or that the issue was deserted and required no finding. (Id.)
- 15. GENERAL RULE AS TO INTENDMENTS ON APPEAL IN SUPPORT OF JUDGMENT.**—The settled rule in this state is that where the appeal is from the judgment on the judgment-roll alone, and where the findings support the judgment, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which could have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary. (Id.)

See Criminal Law, 1, 2, 11, 77; Estates of Deceased Persons, 17; Findings, 4; Fraud, 10; Judgment, 2, 5, 7, 11; Justice's Court, 1-5; Pleading.

ASSIGNMENT.

1. **BUILDING CONTRACT—ASSIGNMENT BY CONTRACTOR OF BALANCE DUE FROM OWNER TO MATERIALMAN—ORDER UPON FUND TO AGENT OF OWNER—SUBSEQUENT LEVY OF EXECUTION.**—An assignment made by a building contractor of the whole balance due to him under the contract with the owner, in favor of a mill and lumber company to which the contractor was indebted for the full amount of such balance, in whose favor an order given was addressed to the owner's agent having custody of such balance, takes precedence over a subsequent levy made upon such balance at the instance of a judgment creditor of the contractor. (*Title Insurance and Trust Co. v. Williamson*, 324.)
2. **RIGHT OF ASSIGNMENT OF BALANCE DUE—GENERAL RULE.**—The contractor had the right to assign the whole balance of the indebtedness due to him from the owners of the building although he could not divide that balance into fractional amounts and make an assignment of the same. It is a general rule that a creditor can only make an assignment of the full amount due, and cannot, without the express consent of the debtor, make partial assignments to diverse persons. The whole debt due the contractor was the subject of assignment without consent of the owners of the property. (*Id.*)
3. **ASSIGNMENT EFFECTED PRIOR TO LEVY.**—Where the assignment was effected prior to the levy of the execution, it left the plaintiff, as disbursing agent for the owner, without any money in his hands belonging to the contractor to which the subsequent levy of the execution against the contractor could attach. It being clear from the circumstances surrounding the transaction that, if the money had been paid over to the assignee, the execution creditor could not have reached it, the prior effected assignment of the whole debt has the same result. (*Id.*)
4. **EQUITABLE ASSIGNMENT OF DEBT.**—In order to constitute an equitable assignment of a debt, no express words to that effect are necessary; but if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. (*Id.*)
5. **ORDER GIVEN TO AGENT OF OWNERS.**—It was not material that the order was addressed to the agent of the owners, instead of to the owners themselves with whom the building contract was made, where such agent was duly authorized to hold the fund and to make payments therefrom upon the contract price to the contractor. (*Id.*)
6. **ASSIGNMENT NOT DEPENDENT UPON NOTICE TO DEBTOR—INTENTION OF ASSIGNOR AND ASSIGNEE.**—The question as to whether the assignment was in fact made is not dependent upon the question of

ASSIGNMENT (Continued).

notice to the debtor, but upon the intention of the alleged assignor and assignee. (Id.)

- 7. OPINION ON PETITION FOR REHEARING IN BANK—QUESTION OF NOTICE TO DEBTOR—UNNECESSARY OPINION—NOTICE TO AGENT SUFFICIENT.**—It is held by the supreme court, on petition for rehearing, unnecessary to say that the assignment to the Carpenter and Biles Mill and Lumber Company would be good against a levy made upon the fund after the assignment and before notice to the debtors, the Dunhams. But if such notice to the debtor was necessary to make the assignment good against a subsequent levy, the notice given to plaintiff, who was the trustee and agent of the Dunhams, to pay the debt to the contractor, or to his assignee, as the case might be, was a sufficient notice to the debtor. (Id.)

See Account, 1, 2, 7, 8; Building Contract, 1, 2; Certiorari, 1; Corporation, 1-3, 18; Guaranty, 7-12; Incompetent Persons, 1, 6; Mortgage, 1-5, 19.

ATTORNEY AT LAW.

- 1. ACTION UPON NOTE—AGREEMENT TO PAY "ATTORNEYS' FEES WHICH MAY BE INCURRED IN COLLECTION"—AVERMENT OF REASONABLE FEE—NEGATIVE PAYMENT.**—In an action upon a note under an agreement to pay "attorneys' fees which may be incurred in the collection of this note," where the complaint averred that "five hundred dollars is a reasonable fee to be allowed plaintiff as attorneys' fees in the collection of said note and the prosecution of this suit," and the defendant merely denied "that five hundred dollars is a reasonable fee to be allowed the plaintiff as attorney's fee in the collection of such note and prosecution of this suit, or otherwise or at all," such denial admitted that any fee under \$500 was reasonable. In this state of the pleadings, the court was authorized to allow \$300 as a reasonable fee. (Conner v. Blodget, 787.)
- 2. UNNECESSARY ALLEGATION AND PROOF—EXPRESS AGREEMENT TO EMPLOY AND PAY PLAINTIFF.**—It was not incumbent upon the plaintiff to allege and show by express proof that an attorney had been employed, and that an agreement had been made to pay him, before the court was authorized to make an allowance for attorneys' fees as having been "incurred" by the plaintiff. (Id.)
- 3. PROPER FOUNDATION IN RECORD FOR ALLOWANCE OF FEES BY COURT—EXPERT EVIDENCE NOT REQUIRED.**—Where the record shows that plaintiff's action was brought by an attorney at law, who signed the complaint, alleging reasonable attorneys' fees, and who also appeared in court, and presented a motion for judgment upon the pleadings, which was granted, the court was authorized, when the nature and extent of the services rendered by the plaintiff were made to appear

ATTORNEY AT LAW (Continued).

from the papers and proceedings had, or by other evidence, to fix such an amount as would be a reasonable compensation for such services, without hearing any expert evidence thereon. (Id.)

ATTORNEY IN FACT. See Account, 1, 7; Agency; Brokers.

BAIL. See Criminal Law, 56.

BANK.

1. **DISHONOR OF TRADER'S CHECKS—MEASURE OF DAMAGES—CONSTRUCTION OF CIVIL CODE—DAMAGES PROXIMATELY CAUSED.**—A trader, who is a depositor in a bank incorporated under the laws of this state, whose checks have been wrongfully dishonored, is not limited to damages under section 3302 of the Civil Code, to the amount due for breach of contract, "with interest thereon," and which has no further application; but is properly entitled, under section 3300 of that code, to the measure of damages "for the breach of an obligation arising from contract," which is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the nature of things, would be likely to result therefrom," or for a *wrong* under section 3333 of that code, the measure of damages for which is the *law* "whether it could have been anticipated or not." (Siminoff v. Goodman & Co. Bank, 5.)
2. **COMMERCIAL INTEREST INVOLVED IN HONOR OF TRADER'S CHECKS—DISHONOR A GRIEVOUS WRONG.**—The whole commercial community and every interest dependent upon commerce are affected by the honor of traders' checks; and the courts should hold banks to the proper performance of their duty to their trader depositors. The consequences to a trader from the dishonor of his checks is so notorious that no bank can justly affect ignorance of what the whole commercial world is vividly alive to. The dishonor of a trader's check without right is a grievous wrong, since the drawer's credit suffers, and a single wrongful refusal to honor his check might work his ruin as a business man. (Id.)
3. **CONSTRUCTION OF CODE IN RELATION TO COMMON LAW.**—The Civil Code establishes the law of this state in so far as it departs from the common law, and where its provisions are in harmony therewith, they are to be interpreted in the light of the common law, and where the code is silent the common law governs. (Id.)
4. **COMMON-LAW RULE AS TO DISHONOR OF BANK CHECKS—SUBSTANTIAL DAMAGES—CASE OF TRADER.**—At common law substantial damages may be recovered against a banker for dishonoring the check of a depositor when there is sufficient money in the banker's hands at the time to meet the check. Whenever the bank fails to

BANK (Continued).

fulfill its agreement with the depositor to honor his check, the depositor, by proving its dishonor, is always entitled to recover substantial damages. In the case of a trader, from the fact of his dishonored check, injury to his credit may be inferred, and substantial damages may be given on proof of that fact. (Id.)

5. **EFFECT OF WRONGFUL ACT OF BANK—IMPUTATION OF DISHONESTY—FELONY.**—The wrongful act of the bank in refusing to honor a proper check not only imputes insolvency, dishonesty or bad faith to the drawer, and has the effect of slandering him in his business, but, in this state, it being a felony to draw or utter to another person a check on a bank knowing at the time that he has not sufficient funds in his hands to meet such check, its dishonor by falsely indorsing it "no funds" suggests a possible case of felony under the law of this state. (Id.)
6. **PLEADING—SPECIAL DAMAGES NOT CLAIMED—SUFFICIENT COMPLAINT—DAMAGES PROXIMATELY CAUSED—SUBSTANTIAL DAMAGES.**—Where no special damages are claimed, none need be pleaded. The complaint shows a case for only such damages as may be shown to have been proximately caused by defendant's breach of duty alleged. It is immaterial whether the facts alleged show the breach of an obligation arising from contract under section 3300 of the Civil Code, or from a wrong under section 3333 thereof, since the rule of damage is substantially the same. Substantial damage is the natural and probable consequence of the act; and a substantial recovery may be had therefor without pleading or proof of special injury. If the depositor is a merchant or trader, substantial damage will be presumed from dishonor, without further proof. (Id.)
7. **CODE PLEADING—FORM OF ACTION IMMATERIAL.**—Under our system of code pleading, the form of the action is immaterial. The pleader may make a plain statement of the facts, and may recover as damages on the facts stated whatever the law will allow, whether arising from contract or from tort. (Id.)
8. **COMPLAINT BY SURETY OF GUARDIAN AGAINST BANK—MONEY OF WARD DEPOSITED IN OWN NAME AND EMBEZZLED—CAUSE OF ACTION NOT STATED.**—A complaint by the surety of a guardian which states that the guardian received a check upon the defendant bank, payable to the guardian as such, from a former curator of the ward, that said bank took a receipt from the guardian, as such, and sent it to the curator, that the guardian indorsed the check, as such, to defendant bank, with instruction to enter the account in his own name, that he drew out and embezzled the money, and died insolvent, and that the surety was compelled to pay the loss to the ward, but which does not allege that the bank profited in any manner especially by the account, states no cause of action against the bank, and a general demurrer thereto was properly sustained.

BANK (Continued).

(United States Fidelity & Guaranty Co. v. First National Bank, 437.)

9. GENERAL RULE—NONLIABILITY OF BANK TO TRUSTEE—LIMITATION.

Where no part of a trust fund is received by a bank otherwise than as a temporary deposit to be paid out on checks by the depositor, the general rule is that, in the absence of any law to the contrary, whatever may be said as to the policy of so doing, there is no legal reason which prevents a trustee from depositing the funds of his *cestui que trust* to his individual account, and that the bank may receive such deposit and pay it out in the discharge of its duty to the depositor, subject to the limitation that the bank, having knowledge of the fiduciary character of the fund, cannot honor checks in its own favor in payment of his personal indebtedness to the bank. (Id.)

- 10 (INSOLVENT BANK—REHABILITATION BY NEW BANK—EXCHANGE OF CLAIMS FOR BONDS—DIVIDEND—AGREEMENT FOR REASSIGNMENT—EXECUTED PAYMENT OF DEBT—RIGHTS OF RECEIVER OF NEW BANK.** Where an insolvent bank was sought to be rehabilitated by a new bank, which took assignments of its claims and issued its bonds to the claimants, and a dividend of fifty cents on the dollar was declared by the insolvent bank, and appellants, as claimants of bonds, being indebted to the receiver of the insolvent bank for rent in \$875, procured \$1,750 of bonds to be delivered, on account of dividends, to pay such debt in full, and agreed with the president of the new bank for a reassignment of the residue of the bonds, that he might receive his share of the residue of the dividend, but before such agreement was executed, the receiver of the new bank repudiated the transaction, it is held that the court properly approved of the payment of such debt, and properly ordered the residue of the uncollected claims of appellants to be turned over to the receiver of the new bank. (People v. Market Street Bank, 698.)

BENEVOLENT SOCIETY.

- 1. VOLUNTARY BENEFICIAL SOCIETY—CONDITION OF MEMBERSHIP—EXPULSION FOR JOINING SIMILAR SOCIETY—PROPER REGULATION—AGREEMENT—PRESUMPTION.**—Where under the constitution and laws of a voluntary, social, fraternal and beneficial society, it was made a condition of membership therein that expulsion should follow the joining of another similar organization, it is held that such regulation is not opposed to public policy, or to any provision of law, and is within the scope of the charter provisions of the organization, which constitute the agreement of its members, each of whom is presumed to know the terms and conditions upon which he may retain his connection with the organization. (Neto v. Conselho Amor Da Sociedade No. 41, 234.)

BENEVOLENT SOCIETY (Continued).

2. **POWER OF MEMBERS OF VOLUNTARY ASSOCIATION.**—Individuals who form themselves into a voluntary association may agree to be governed by such rules as they see fit to adopt, so long as they are not immoral, or contrary to public policy or the law of the land, and may prescribe the conditions upon which membership may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, and the tribunal and mode in which offenses shall be determined, and the penalty enforced. (Id.)
3. **VIOLATION OF RULES BY MEMBER—EXPULSION—MISTAKE OF LAW—EXHAUSTION OF REMEDIES REQUIRED BEFORE SUIT—DEFENSE.**—Where a member has violated the existing rules of a voluntary society by joining another similar society, such member's mistaken view of the existing law cannot affect a judgment of expulsion, and a member who has been tried and found guilty of such violation must first exhaust all the remedies prescribed by the constitution and rules of the society regulating expulsion, before seeking relief in a state court, and the failure to do so would be a complete defense to any suit for relief therein. (Id.)
4. **REMEDY BY MANDAMUS—EQUITABLE NATURE—IMPROPER APPLICATION.**—A member who has been expelled and has failed to exhaust the remedies prescribed by the order in relation thereto, and who admits the violation of the rules of the order, providing for expulsion, and merely claims that the expulsion was irregular, cannot invoke the remedy by *mandamus* to compel a reinstatement of such member. The remedy so sought is of an equitable nature, which presupposes a wrong to be redressed and a right to be restored; and a petitioner therefor who, while continuing to violate rules requiring expulsion, assumes the attitude of seeking to annul an irregular expulsion, in order to be regularly expelled, is not entitled to the writ of mandate for such a vain and nugatory purpose. (Id.)
5. **DESIGN OF WRIT OF MANDATE—SUBSTANTIAL JUSTICE.**—The writ of mandate is not to be issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injury. (Id.)
6. **SUBSTANTIAL RIGHTS OF APPELLANT NOT INVADED.**—It is held on petition for rehearing that no substantial rights of the appellant appear to have been invaded. (Id.)

BILL OF EXCEPTIONS. See *Frard*, 13.

BOARD OF EDUCATION. See *Employer and Employee*.

BONA FIDE PURCHASER. See *Deed*; *Homestead*, 3; *Mortgages* 1-5, 9.

BOUNDARIES. See Vendor and Vendee, 1.**BROKERS.**

1. **ACTION FOR DAMAGES FOR BREACH OF CONTRACT TO SELL LAND—LIMITED AUTHORITY OF BROKERS—CAUSE OF ACTION NOT STATED—GENERAL DEMURRER.**—A complaint in an action for damages for breach of a contract to sell land, purporting to be signed by real estate brokers, in the name of the vendor, and which sets forth their contract of employment by the vendor, defendant, which merely shows that they were employed to negotiate a sale, at an agreed price, for a specified commission, reserving to the vendor the right to sell the property, and agreeing to pay two per cent commission in case of sale, and which contained no express authority to the brokers to make a binding contract of sale, states no cause of action, and a general demurrer thereto was properly sustained. (*Church v. Collins*, 745.)
2. **SETTLED RULE AS TO AUTHORITY OF BROKERS—POWER TO EXECUTE CONTRACT MUST BE FREE FROM DOUBT.**—Under the code provisions, and the settled authorities with regard to the power or right of brokers, as agents of the owner of land, to execute a contract of sale for such owner, the settled rule is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such was its purpose. The ordinary authority of a real estate agent is to find a purchaser, and he has no power to bind his principal by a contract, unless it was intended to confer such additional authority. (*Id.*)
3. **GENERAL TENOR OF AGREEMENT IN QUESTION—NULLITY OF ACTION OF BROKERS.**—It is held that the general tenor of the whole agreement in question clearly shows an intention on the part of the owner to limit the authority of the brokers merely to the procurement of a purchaser ready, willing and able to buy the same, and not to confer upon the broker the right or power to execute for him a contract of sale; and that any act on the part of the brokers, beyond the authority conferred, was a nullity, so far as any effect it was designed to have on the owner was concerned. (*Id.*)
4. **ACTION FOR BROKER'S COMMISSIONS—AUTHORITY TO SELL TWO TRACTS—INTERESTING PERSON WHO BUYS ONE TRACT FROM OTHER AGENTS—NONSUIT.**—Where the written authority of a broker, whose assignee is suing for his commissions on the sale of one of two tracts of land, was for the joint sale of the two tracts, at a fixed price, upon a commission of five per cent, and through the broker's efforts a person became interested in the smaller parcel, but he was not introduced to the owner, and the sale thereof was effected through other agents, the plaintiff was properly nonsuited, because, first,

BROKERS (Continued).

the evidence shows no sale under the written authority, and because, second, the sale on which the commission is claimed was not effected by the broker as the proximate cause thereof. (*Cone v. Keil*, 675.)

5. **ESSENTIALS OF RECOVERY OF BROKER'S COMMISSIONS.**—A broker is entitled to his commissions for effecting a sale of property only when it affirmatively appears that the purchaser, as the result of the broker's efforts, was induced to buy the property, or that a prospective purchaser was ready, able and willing to buy upon the terms and at the price specified by the owner. The obligation of the broker under his contract with the purchaser is to bring about a meeting of minds between the owner and a prospective purchaser for a sale of the property at the price and upon the terms at which the property is offered for sale, and which could be enforced by the owner, if he has a perfect title. Or if there is no contract, it must appear that the broker brought the owner and prospective purchaser together, with the view to effect and secure a contract of sale upon the owner's terms. (*Id.*)
6. **PUTTING PROSPECTIVE PURCHASER UPON TRACK OF PROPERTY ON MARKET.**—Merely putting a prospective purchaser on the track of property which is on the market will not entitle the broker to the agreed commission, nor will he be entitled thereto if he finally fails in his efforts, without the fault or interference of the owner, to induce the prospective purchaser to buy, or make an offer to buy, although the owner may subsequently, either personally or through other brokers, sell the same property to the same individual at the price and terms for which the property was originally offered for sale. (*Id.*)
7. **PLEADING—CAUSE OF ACTION LIMITED TO INDIVISIBLE CONTRACT OF SALE—ABSENCE OF PROOF—PROPER NONSUIT.**—Where the complaint states only a cause of action on the written contract authorizing the broker to sell both tracts together, and does not allege any modification of the same, or any other employment of the broker by the owner of the property, it shows an indivisible contract of sale for the entire property, which required the broker to procure a purchaser for the entire tract before he could be entitled to any commissions; and there being an entire absence of proof as to the performance of the contract alleged, for this reason, if for no other, a nonsuit was properly granted. (*Id.*)
8. **EVIDENCE OUTSIDE ISSUES.**—Where the assigned claim sued upon by the plaintiff was for commissions on the sale of one tract only, evidence of a subsequent purchase of part of the other tract is outside the issues, and is inadmissible. (*Id.*)
9. **ADMISSION OF LETTER NOT MADE PART OF RECORD—ERROR NOT APPEARING.**—Error, to be a ground of review, must affirmatively appear; and where a letter was admitted in evidence which is no

BROKERS (Continued).

part of the record, it must be presumed that the ruling of the trial court in relation thereto was correct. (Id.)

10. **BROKER'S COMMISSIONS—ORAL REQUEST FOR SERVICES—STATUTE OF FRAUDS—MEMORANDUM IN WRITING REQUIRED.**—The fact that a broker, suing for commissions, on a sale of real estate, performed valuable services for the defendant at his oral request, cannot authorize the recovery of any compensation therefor, in the absence of some note or memorandum in writing, subscribed by the defendant, whereby plaintiff was employed or authorized to negotiate the sale or exchange, as required by subdivision 6 of section 1624 of the Civil Code. (Patterson v. Torrey, 346.)
11. **IMPROPER FINDING—INCONSISTENCY WITH PLAIN IMPORT OF LANGUAGE USED.**—It is held that, while the court finds that the instrument was made and delivered by the defendant "for the purpose of authorizing the plaintiff, as such real estate broker, to make such sale and exchange of said property of defendant for commission on the terms and price specified for defendant," nevertheless the purpose specified in such finding is wholly inconsistent with the plain import of the language used by the parties. (Id.)
12. **NAKED ACT OF OWNER FIXING PRICE.**—The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property. (Id.)

BUILDING CONTRACT.

1. **BUILDING CONTRACT WITH CITY—ABANDONMENT—MATERIALS LEFT ON GROUND—CITY'S OWNERSHIP—ABSENCE OF LIEN—INVALID TRANSFER BY CONTRACTOR.**—Where a contractor, under a valid building contract with a city, after part performance thereof, abandoned the contract, leaving materials on the ground acquired for use in the building, the city, as owner of the building, becomes the owner of such materials, under section 1200 of the Code of Civil Procedure, and is entitled to use the same in completing the building according to the contract; and the fact that the building is not subject to any lien cannot affect the city's rights to such materials, nor can its rights be defeated by any attempt of the contractor to transfer the same absolutely, or by way of securing his creditors. (Quartaroli v. City of Sonoma, 400.)
2. **ABANDONMENT OF MATERIALS BY CONTRACTOR—USE IN BUILDING—ACTION FOR VALUE BY ASSIGNEES NOT TENABLE.**—The contractor's abandonment of the contract was in legal effect as much the abandonment of the materials delivered and on the ground, as of the materials which had gone into the building, and all of the materials are

BUILDING CONTRACT (Continued).

to be treated alike as the property of the owner. After they have been used in the building in completion of the contract, the contractor certainly could not maintain any action for the value of the materials left on the ground, neither could his assignees be accorded any stronger position. (Id.)

3. **PREVENTION OF PERFORMANCE—LOSS OF BUILDING BY FIRE—PROTECTION BY CONTRACT ESSENTIAL.**—Where one contracts to furnish labor and materials in the building of a house or other structure for a specified sum, to be paid in installments, the builder cannot recover for a partial construction, in case the building is destroyed by fire, without the fault of either party, unless the builder is protected against such contingency by the terms of the contract. (Keeling v. Schastey & Vollmer, 764.)
4. **OTHER CONDITIONS OF RECOVERY BY BUILDER FOR PREVENTION OF PERFORMANCE ENUMERATED—ACT OF GOD—FIRE NOT INCLUDED.**—The builder can only recover for partial compensation when the full performance of his contract is prevented by the act of the ether party, or by operation of law, or by the act of God, or of the public enemy. Fire is not to be classified as an act of God. (Id.)
5. **CONTRACT FOR WORK AND MATERIALS ON EXISTING BUILDING—IMPLIED CONDITION OF CONTINUED EXISTENCE—LOSS BY FIRE—ASSUMPSIT FOR REASONABLE VALUE.**—Where one agrees to furnish work and materials upon an existing building, such as to do painting and plastering work thereon, such agreement is upon the implied condition that the building shall continue to exist, and its destruction by fire, without the fault of either party, will excuse the full performance of such agreement, and will entitle the agreeing party to recover the reasonable value of the work and materials in part performed, prior to the fire, upon an implied assumpsit. (Id.)
6. **ASSUMPSIT NOT UPON CONTRACT—TERMS OF CONTRACT NOT CONTROLLING.**—An action will only lie upon such contract when it has been fully performed; but an action of assumpsit for work and materials furnished prior to the accidental loss of the building by fire, to recover its reasonable value, is not upon the contract, and the terms of the contract in this regard are not controlling. (Id.)

CAUSES OF ACTION. See *Negligence*, 10.

CERTIORARI.

1. **WRIT OF REVIEW—CERTIFICATION OF TRANSCRIPT BY JUDGE—APPEAL UNDER NEW METHOD—OMISSION OF REQUESTED PAPERS—JURISDICTION.**—The only thing which a judge of the superior court is required to certify as a transcript on appeal under the new practice, in lieu of a bill of exceptions, is the stenographer's notes of the trial, containing the proceedings and evidence which would form no part of the record unless authenticated as the statute requires.

CERTIORARI (Continued).

The court in signing such a transcript does not exceed its jurisdiction in omitting papers requested by the appellant which appear to be irrelevant; but if the fact were otherwise, and the requested papers should have been inserted, the court did not exceed its jurisdiction in signing such transcript as in its opinion is correct; and a writ of review will not lie on account of such omission. (*Lapique v. Superior Court*, 50.)

2. **OFFICE OF WRIT OF REVIEW.**—The writ of review only lies where an inferior court or tribunal has acted without jurisdiction; and there is no other speedy and adequate remedy. (*Id.*)

See *Justice's Court*, 5, 6, 10, 11.

CHattel Mortgage. See *Mortgage*, 6-15.

CHECK. See *Bank*.

COMMUNITY PROPERTY.

1. **STATUTORY PROCEEDING BY HUSBAND TO DETERMINE VESTING OF COMMUNITY PROPERTY IN NAME OF DECEASED WIFE—REPRESENTATIVES OF DECEASED WIFE NOT CONCLUDED IN PARTITION.**—A statutory proceeding, under section 1723 of the Code of Civil Procedure, to have it determined that real property standing in the name of the deceased wife was community property which vested in the husband at the time of her death, does not constitute a conclusive adjudication against the representatives of the deceased wife, who were in the possession of the property, and were not parties thereto, and were not before the court, so as to give it the effect of an equitable decree as against them; and it may be shown by them in a subsequent action for partition, in which the representatives of the deceased wife and of the deceased husband are before the court, that the property was the separate property of the wife, and it may be so found and adjudged by the court. (*McPike v. Mehrmann*, 501.)

2. **PURPOSE OF STATUTORY PROCEEDING—CONDITIONAL EFFECT OF DECREE.**—The statutory proceeding taken under section 1723 of the Code of Civil Procedure is only intended as a means to have it determined that a person is dead, upon whose death the asserted right of another person depends, and not to have the validity of that right conclusively adjudicated. The decree in the proceeding, as respects persons not parties, merely determines conditionally that if the party petitioning has any asserted right or title accruing on the death of another person, such right or title has accrued. (*Id.*)

CONSPIRACY. See *Criminal Law*, 33.

CONSTITUTIONAL LAW. See *Counties*; *Criminal Law*, 14, 19, 78, 79; *Electric Company*, 3; *Municipal Corporations*, 1, 2; *Negligence*, 24; *Office and Officers*; *Schools*, 1-7.

CONTEMPT.

1. **CONTEMPT OUT OF VIEW OF COURT—REFUSAL TO PAY ALIMONY AND COUNSEL FEES ORDERED—FACTS SHOWING JURISDICTION REQUIRED.**—The contempt for refusal to pay temporary alimony and counsel fees ordered by the court is one not committed in the immediate view and presence of the court, and the facts essential to show the jurisdiction of the court to proceed therewith must be embodied in an affidavit stating the facts constituting the contempt, presented to the court or judge, in the absence of any other showing provided for in section 1211 of the Code of Civil Procedure. (Matter of Northern, 52.)
2. **PROCEEDINGS IN CONTEMPT—JURISDICTION LIMITED—JURISDICTIONAL FACTS IN RECORD.**—In proceedings in contempt, the jurisdiction of the superior court is limited, and jurisdictional facts must be made to appear in the judgment and order of commitment for contempt. (Id.)
3. **VOID COMMITMENT TO COUNTY JAIL—HABEAS CORPUS.**—In the absence of any affidavit stating the facts showing the contempt, and there being nothing in the record to show the jurisdiction of the court to commit the defendant to the county jail for contempt, the order so made by the court was without jurisdiction, and he is entitled as petitioner to be discharged upon writ of habeas corpus. (Id.)

CONTRACT.

1. **RULE AS TO PARTLY WRITTEN AND PARTLY PRINTED PROVISIONS IN CONTRACT.**—Where a contract is partly written and partly printed, or is written or printed under special directions of the parties to meet their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties or contract in question, the written controls the printed portions. If the two are absolutely repugnant, the printed part must be disregarded. (Bonslett v. Butte County Canal Co., 149.)
2. **GENERAL RULES AS TO CONSTRUCTION OF CONTRACTS—INTENTION OF PARTIES—AMBIGUITY—EXPLANATION BY CIRCUMSTANCES.**—In construing a contract, the intention of the parties is to govern, and is to be ascertained from the writing alone, if possible. Where there is ambiguity or uncertainty, the contract must be interpreted in the sense in which the promisor believed at the time of making it the promisee understood it. The contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates; and such circumstances, including the situation of the subject of the instrument and of the parties to it, may be shown, so that the judge may be

CONTRACT (Continued).

placed in the position of those whose language he is to interpret. (Id.)

See Building Contract; Employer and Employee; Fraud; Incompetent Persons; Restraint of Trade; Sale; Schools, 9-11; Specific Performance; Vendor and Vendee; Water and Water Rights.

CONVERSION. See Mortgage, 6-11.**CORPORATION.**

1. **INSOLVENT CORPORATION—PROCESS OF LIQUIDATION—RIGHT OF STOCKHOLDERS TO ASSIGN SHARES—RIGHT OF REGISTRY BY ASSIGNEE.**—There appears to be no rule of law nor any reason which precludes an owner of stock in an insolvent corporation, which is in process of liquidation, from transferring the same to whomsoever he pleases. The law embodied in section 324 of the Civil Code expressly provides that shares of stock, to evidence which certificates are issued, constitute personal property, and may be transferred. Though shares of stock in an insolvent corporation may possess little, if any, intrinsic value, it is nevertheless property, and its transfer carries with it the rights that would accrue to the original owner thereof, and he has the right to be registered in the stock book of the corporation as the owner of the stock so transferred to him. (*People v. California Safe Deposit and Trust Company*, 732.)
2. **STOCKHOLDERS UNAFFECTED BY INJUNCTION AGAINST THE CORPORATION AND OFFICERS.**—The stockholders of the corporation, as such, are unaffected by an injunction against the insolvent corporation and its officers to prevent the same from carrying on its business, and such injunction cannot preclude a transfer of stock therein by such stockholders or affect its validity, subject only to the individual liability of a stockholder for debts of the corporation contracted during his ownership of the stock. (Id.)
3. **REMEDY TO COMPEL ENTRY OF STOCK—PARTIES—ENTRY BY RECEIVER—CUSTODY OF BOOKS.**—The stockholder to whom the stock has been transferred may properly proceed to compel the entry of the stock upon the books of the corporation by making the corporation a party defendant, and there being no directors in charge of the corporation, they need not be made parties, and as the receiver is the legal custodian of all the books of the corporation, he may be made a party defendant, and commanded to make the proper entry of the transfer of the stock upon the books of the corporation. (Id.)
4. **TREATMENT OF PERSON INJURED WITHOUT OBLIGATION FOR INJURY—LIABILITY FOR HOSPITAL CHARGES—OSTENSIBLE AUTHORITY OF AGENTS.**—A corporation is liable for hospital charges for the care

CORPORATION (Continued).

of a person injured through instrumentalities used by it, although no legal or moral obligation may rest upon the corporation to care for him, where officers and agents of the corporation, with ostensible authority, directed the hospital authorities to take charge of such person, and to continue the service. One who was assistant to the general manager of the corporation, with authority to look after its interests in his absence, had ostensible authority, in the absence of the manager, to contract, in an emergency, for such hospital service, and its chief surgeon had such authority to direct its continuance. (*Rich v. Edison Electric Co.*, 354.)

5. **RULE AS TO POWER OF SUBORDINATE EMPLOYEES TO CONTRACT FOR CARE OF PERSONS INJURED.**—As a rule, even subordinate employees of a corporation, who under ordinary circumstances have no power to bind the corporation by contract, possess power, where an urgent necessity exists for immediate employment, by reason of injuries incident to the operations of the corporation, to employ medical help to alleviate the condition of persons so injured. (*Id.*)
6. **RIGHT OF OWNER OF HOSPITAL TO ASSUME THAT POWER OF ASSUMED AGENTS EXISTED—KNOWLEDGE OF MANAGER—PRESUMPTION.** The plaintiff, as the owner of the hospital, had the right to assume that persons representing the heads of departments of the corporation defendant possessed the authority which they represented; and where it appears that the general manager of the corporation had knowledge of the conditions and took no action personally, his acquiescence and that of the corporation must be presumed. (*Id.*)
7. **SURGICAL SERVICES NOT CONTRACTED FOR—NONLIABILITY OF CORPORATION.**—Where surgical services were rendered in the hospital before any instructions in that behalf were given by any officers of the corporation, and there is nothing in the record to disclose that any legal liability existed against the corporation otherwise, to pay for such surgical services by reason of any negligence on its part causing the injury, the corporation is not liable for such surgical services, though necessary to save the life of the person injured. For aught that appears, the surgical services were voluntarily performed, and the defendant owed no legal duty to pay therefor. (*Id.*)
8. **SETTLEMENT OF ACTION BY PERSON INJURED AGAINST CORPORATION—LEGAL LIABILITY NOT ESTABLISHED.**—The mere settlement of an action brought against the corporation defendant by the person injured, by the payment of a specific sum to secure its dismissal, does not of itself establish the matters involved in the question of legal liability. It may be, and often is, the case that actions of this character are settled and dismissed where no liability exists, other considerations entering into the transaction. (*Id.*)

CORPORATION (Continued).

- 9. COMMERCIAL CORPORATION—POWER OF OFFICER TO EXECUTE NOTE—RECORD AUTHORITY NOT CONFERRED—IMPLICATION—POWER TO TRANSACT BUSINESS.**—Although no record proof appears that any particular officer of the defendant, as a commercial corporation, was specifically authorized by its board of directors to execute notes on its behalf, yet, upon the question of implied authority, it is to be considered that the very nature of commercial corporations requires that the authority to transact their ordinary business affairs shall be vested in one or more persons; and its president or general manager, or whoever may be given immediate direction or control of its affairs, is its agent, empowered, unless expressly restricted to certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes. (*Stevens v. Selma Fruit Co., Inc.*, 242.)
- 10. INFERENCE FROM GENERAL AUTHORITY.**—Where the authority to do some particular act, which is included within the ordinary affairs of a commercial corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer authority upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation to perform such particular act will be inferred from the general authority so given. (*Id.*)
- 11. OFFICER HELD OUT BY CORPORATION AS HAVING GENERAL AUTHORITY—OSTENSIBLE AUTHORITY—ESTOPPEL.**—Where an officer of a corporation is held out by the corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of the officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. (*Id.*)
- 12. ACTION OF SECRETARY AND MANAGER IN EXECUTING NOTES UNDER SEAL—PRESUMED KNOWLEDGE OF DIRECTORS—SANCTION.**—In an action upon a note of the defendant corporation executed by its secretary and manager, under the corporate seal, representing the proceeds of fruit shipped by the corporation, the money for which was collected and held by it, where such secretary and manager testified that he had as such officer executed other notes for the corporation under its seal, as acts of the corporation, and that his authority to do so was never questioned by the board of directors or by its president, the board must be presumed to have had knowledge of such acts, and to have authorized the same, as the course of the corporate business may require. (*Id.*)
- 13. REASONABLE CONSTRUCTION OF RESOLUTION OF DIRECTORS—IMPLIED POWER OF MANAGER TO EXECUTE NOTES.**—It is held that under a

CORPORATION (Continued).

reasonable construction of a resolution of the board of directors of the defendant corporation, its manager had implied power to execute notes in the conduct of its business in favor of parties to whom it became indebted, where by its terms he was authorized "to purchase the necessary supplies and to buy and sell the goods and products in which the corporation intends to deal," and was given "the immediate direction of said operations," and it was provided "that the authority of its president shall be exercised over and through its manager, so long as he shall properly conduct said business and operations." (Id.)

14. **RATIFICATION OF NOTE IN SUIT BY PRESIDENT.**—Where there is no question as to the power of the president of the corporation to execute a note in its behalf, and the fact is undisputed in the record that the president authorized the manager to pay the note in suit, as a liability of the corporation upon its maturity, he thereby ratified the act of the manager in executing the note. (Id.)
15. **CONTRACT BY FORMER CORPORATION FOR SALE OF RAISINS—BUSINESS ASSUMED BY DEFENDANT—DELIVERY AND COLLECTION—NOTE—UN-
TENABLE DEFENSE.**—Although a contract for the sale of raisins belonging to a firm of which plaintiff was a member was made by a former corporation, whose business was taken over by the defendant, as a new corporation, as of a date when said contract had not been executed by delivery, and defendant, after the organization, delivered the raisins to the party who had contracted therefor, and collected the money, which it wished to retain in its business, and upon settlement therefor the note in suit was given, a defense to the note on the ground that defendant had no relation to the contract of the former corporation and that the note is without consideration is untenable. (Id.)
16. **PRESUMPTION OF CONSIDERATION OF NOTE—BURDEN OF PROOF NOT SUSTAINED.**—The note in suit is presumed to have been given for a sufficient consideration, and defendant has the burden of proof to show that it was given without consideration. That burden is not sustained where it appears unquestionably that the note was given for money collected by defendant which belonged to plaintiff's firm and was borrowed by defendant therefrom. (Id.)
17. **IMMATERIAL QUESTION—ACTION OF DEFENDANT AS BROKER.**—In such case, the question whether the defendant in delivering the raisins in execution of the former contract with the former corporation, and in collecting the money therefor, acted as a broker in the sale of the raisins or not is immaterial. (Id.)
18. **ASSIGNMENT OF FIRM RIGHT TO PLAINTIFF BY COPARTNER.**—Where both members of the firm of Stevens & Son, with which the settlement was made by defendant, and to which its note in suit was given, testified that before the commencement of the action R. E.

CORPORATION (Continued).

Stevens, the son, transferred and assigned all his interest in the account and note in question to his father, E. M. Stevens, who is plaintiff in the action and respondent upon appeal, it is held that such assignment was valid and vested the sole ownership of the account and note in plaintiff. It was not necessary that the assignment should have been made by the firm. (Id.)

19. **FOREIGN CORPORATION—UNAUTHORIZED JUDGMENT BY DEFAULT—DOING BUSINESS IN STATE NOT SHOWN—SERVICE OF SUMMONS UPON PRESIDENT.**—In an action against a foreign corporation, where the complaint shows that it is a foreign corporation, authorized by its charter to own stock in other corporations, and judgment was sought against it upon its statutory liability as a stockholder in a corporation organized under the laws of this state, but where neither the complaint nor the affidavit of service of summons upon its president shows that it is doing business in this state, or that it had a managing agent, cashier or secretary within the state, upon whom service of summons can be made, it was insufficient to support a clerk's judgment by default, under section 411 of the Code of Civil Procedure. (*R. H. Herron Company v. Westside Electric Co.*, 778.)

20. **EFFECT OF OWNERSHIP OF SHARES IN DOMESTIC CORPORATION—"DOING BUSINESS IN STATE"—PRESIDENT NOT PRESUMED "MANAGING AGENT."**—If it be conceded that the effect of the ownership of shares by a foreign corporation in a domestic corporation, organized under the laws of this state, constitutes a "doing business" by such foreign corporation in this state, it does not follow that the president of such foreign corporation who is served with summons shall be presumed to be the managing or business agent of such foreign corporation. (Id.)

See Accounting, 1; Benevolent Society; Criminal Law, 12-18; Electric Company; Lease, 1, 3; Municipal Corporations.

COSTS. See Justice's Court, 1-3.

COUNTIES.

1. **POWER OF LEGISLATURE TO CLASSIFY COUNTIES—LIMITED PURPOSE.**—The power conferred upon the legislature by section 5 of article XI of the state constitution to classify counties by population, is held to be a power to be exercised for the limited purpose of enabling the compensation of the various officers to be fixed and adjusted. (*Payne v. Murphy*, 446.)
2. **CLASS OF SINGLE COUNTY—AMENDMENT OF CODE—CREATION OF COUNTY OFFICE OF STENOGRAPHER—PROVISO—VOID SPECIAL AND LOCAL LEGISLATION.**—The amendment of 1911 to section 4256 of the Political Code, relative to the compensation of officers in coun-

COUNTIES (Continued).

ties of the twenty-seventh class, which comprises the county of San Luis Obispo alone, adding a special proviso to section 13 thereof, fixing the compensation of justices of the peace, that in counties of this class a stenographer shall be appointed by the judge of the superior court, with the duties to report the proceedings at preliminary examinations and coroner's inquests, at a salary of \$100 per month, to be paid out of the county treasury, in the same manner and at the same time as other salaries are paid, is not only out of place, as such proviso, but is also unconstitutional and void, as creating a special and local county office, and prescribing the special and local powers and duties of an officer, in violation of subdivision 28 of article IV of the state constitution. (Id.)

COURTS. See Justice's Court; Juvenile Court; Superior Courts.

CRIMINAL LAW.

1. **APPEAL—FAILURE OF APPELLANT TO FILE BRIEF—DISMISSAL.**—Where the appellant in a criminal case fails to file a brief or any points and authorities as required by rule 4 of the supreme court, the appeal must be dismissed under rule 5 of that court. (*People v. Mario*, 70.)
2. **REASON FOR RULE AS TO DISMISSAL.**—The reason of the rule requiring a dismissal in such case is that the appeal presupposes a debatable ground therefor, and it is the duty of the appellant to point out the specific points upon which he seeks to support his appeal; and it is not contemplated that the reviewing court, unaided by the appellant, shall make an independent investigation to ascertain whether he has been legally convicted. (Id.)
3. **ROBBERY—SUPPORT OF VERDICTS—CORRECT CHARGE.**—Though not required to examine the record, it is held from a careful inspection thereof that the verdict of conviction for robbery against each of the appellants is sustained by the evidence, and that the instructions in both cases fully, fairly, clearly and correctly covered every phase of each case, as disclosed by the charge and the evidence. (Id.)
4. **POWER OF COURT TO SUSPEND SENTENCE FOR MAXIMUM TERM.**—A court has power, under section 1203 of the Penal Code as amended in 1911, to place a defendant upon probation for the full maximum term of sentence provided for the offense of which he is convicted, and when a defendant is placed on probation without limitation of time, the same extends to such maximum term of sentence, and no longer. (*Matter of Giannini*, 166.)
5. **CONSTRUCTION OF STATUTE—POWER OF SUSPENSION NOT LIMITED BY FAILURE OF COURT TO PLACE DEFENDANT IN CARE OF PROBATION**

CRIMINAL LAW (Continued).

OFFICER.—It is held that the proper construction of the statute is that absolute power of suspending sentence is given by such section of the Penal Code as amended, and that where a court acts under the statute, within the limits thereof, such order of suspension is not invalidated because the court omits a duty imposed by law upon it to place the party in charge of a probation officer. The functions of the probation officer are not to hold the defendant in custody, but to exercise a supervisory control over his conduct as an arm or instrument of the court. (Id.)

6. **SENTENCE NOT TRUSTED TO PROBATION OFFICER—COMMITMENT UPON REVOCATION OF SUSPENSION.**—The legislative intent that no part of the sentence is included within the period of the probation officer's surveillance is apparent when it is considered that upon the revocation of the original order of suspension, the law permits the commitment of the defendant for the full term of the sentence as originally pronounced. The statute confers the power of revocation and modification upon the court for any cause which to the court is good and sufficient. (Id.)

7. **REVOCATION OF SUSPENSION ESSENTIAL TO POWER OF COMMITMENT.** The court having, by its judgment, suspended the execution of the sentence under the statute, and having jurisdiction so to do, the same became an operative judgment of court, and so remains until revoked or modified by an order regularly made; and in order that the court should possess the power to issue a commitment to one whose sentence had theretofore been suspended, a revocation or modification of the order of suspension is an essential prerequisite. (Id.)

8. **COMMITMENT BY JUSTICE OF PEACE—AFFIRMATIVE SHOWING OF REVOCATION OF SUSPENSION REQUIRED—ABSENCE OF INTENDMENTS.** Where the order of suspension of sentence was made by a justice of the peace, no intendments can be made in favor of a subsequent judgment of commitment made by him, under the sentence; but his jurisdiction to make it must affirmatively appear; and where the record does not disclose that any modification or revocation was ever made by the justice, the commitment by him was without authority of law, and the prisoner's detention thereunder was unlawful. (Id.)

9. **HABEAS CORPUS.**—The commitment being invalid, the prisoner is entitled to be discharged from custody thereunder upon writ of *habeas corpus*. (Id.)

10. **CODE PROVISION NOT CONFLICTING WITH EXECUTIVE AUTHORITY OF GOVERNOR.**—Section 1203 of the Penal Code, as now existing, regulating the suspension of sentences, and the power of commitment thereafter under the sentence, does not interfere in any way with the functions and duties of the governor of the state. (Id.)

CRIMINAL LAW (Continued).

11. ORDER DENYING ARREST OF JUDGMENT—REVIEW UPON APPEAL.—An order denying a motion in arrest of judgment in a criminal case is not appealable, but it may be reviewed upon appeal from the judgment. (*People v. Merritt*, 58.)
12. CRIME UNDER ACT FOR PROTECTION OF STOCKHOLDERS—SCOPE OF TITLE.—A provision for the punishment as a crime of enumerated acts that may result in deceiving the stockholders of a corporation or others dealing therewith comes within the general scope of the title of "An act to protect stockholders and persons dealing with corporations in this state." (*Id.*)
13. TITLE OF AMENDATORY ACT—GERMANE AMENDMENT—PENAL PROVISIONS.—An amendment to a valid law need not more fully state the subject of the amended statute than it is stated in the valid statute amended. The title of the act of March 22, 1905, entitled, "An act to amend 'An act to protect stockholders and persons dealing with corporations in this state,' approved March 20, 1878," sufficiently expresses the subject matter of the amendment notwithstanding the body of the act as amended is wholly penal in its provisions. (*Id.*)
14. CONSTITUTIONALITY OF AMENDATORY ACT.—Though, if the amendatory act of 1905 would, if passed as a new act, be invalid under the present constitution, yet it is nevertheless valid, since the original act of 1878 was valid under the former constitution, and since the amendatory act recites the original valid act, of which it is amendatory, and re-enacts the act as amended in full. This is a sufficient compliance with the constitution, both as to the title of the amendatory act and as to the manner of amending the original act. (*Id.*)
15. CONVICTION OF CRIME CHARGED—FRAUDULENT PROSPECTUS OF OIL COMPANY—MOTION TO ARREST JUDGMENT PROPERLY DENIED.—Where the crime charged under the amended act was the publication by the defendant as secretary and manager of an incorporated oil company of a willfully false and exaggerated report, prospectus, account and statement of the operations, values, business and expenditures, and prospects of said oil company, with the intent to defraud the public and persons generally, the information therefor is sufficient, and after a verdict of guilty, upon sufficient evidence, a motion in arrest of judgment was properly denied. (*Id.*)
16. EVIDENCE—ADMISSION OF ENTIRE PROSPECTUS—APPEAL TO PUBLIC TO TAKE STOCK—FALSITY—FRAUDULENT INTENT.—Where the published prospectus is set forth in full in the information, and the intent to defraud was charged in accordance with the statute, and in its intent it was well calculated to induce persons who might read it to purchase stock in the company, and was an appeal to the public to purchase stock therein, it was properly admitted in evi-

CRIMINAL LAW (Continued).

dence as a whole, which, when taken in connection with evidence of the falsity of the matters therein alleged to be untrue, tended to show that the false portions thereof were published with intent to defraud the public, and persons who might be induced thereby to invest in the stock of the company. (Id.)

17. **CLAIM OF OIL LAND—PROOF OF FALSITY—PRIOR AFFIDAVITS AS TO GRAZING PURPOSES—APPLICATIONS FROM STATE.**—Where the prospectus stated that “this land is made up of more certain indications of oil than any other field in the state,” evidence is admissible as tending to show the falsity of that statement that, prior to the prospectus, applications were made to purchase lands from the state, included therein, in connection with which defendant swore that the lands were principally adapted to grazing purposes; and the applications were admissible as part of the *res gestae* of the making of the affidavits, in order to show that the affidavits were statements of material matters made upon an oath authorized as required by law. (Id.)
18. **CROSS-EXAMINATION OF DEFENDANT—MATTERS NOT TESTIFIED TO IN CHIEF—ERROR WITHOUT PREJUDICE.**—Upon cross-examination of the defendant as to matters not testified to in chief,—concerning prior mineral locations which were fragmentary evidence, having no effect on the case; and concerning additional development work, which could only be of service to the defendant; and concerning his signature to an affidavit of grazing lands which had been fully proved in the case; and concerning a corrected letter admitted on cross-examination which was an immaterial substitute for the original admitted in chief,—there was no prejudicial error as to any of such matters. (Id.)
19. **EFFECT OF AMENDMENT TO CONSTITUTION REQUIRING SUBSTANTIAL INJURY TO APPEAR FROM ERROR.**—The recent amendment to the constitution, known as section 42 of article VI of the constitution, providing that no judgment shall be set aside or new trial granted in a criminal case for any error, “unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice,” requires at least that it must appear to the court affirmatively that the defendant has been injured in a substantial manner by the error complained of. (Id.)
20. **INJURY NOT PRESUMED FROM ERROR.**—Under the amendment there can be no presumption of injury from the mere fact of error; but substantial injury as well as the error must be made affirmatively to appear. (Id.)
21. **REQUESTED INSTRUCTION AS TO AFFIDAVITS FOR GRAZING PURPOSES—RIGHT TO PUBLISH PROSPECTUS AS TO OIL—REQUEST PROPERLY MODIFIED.**—A requested instruction as to the effect of defendant's

CRIMINAL LAW (Continued).

- affidavits for grazing purposes, which concluded with the following sentence: "If the defendant did in fact believe that there was oil and oil formations in said land, but there had been no mineral discovery actually made thereon, he, notwithstanding such belief, had a legal right to make an affidavit that such land was principally adapted for grazing purposes, yet, under such circumstances, he would have a legal right to subscribe, verify and publish a prospectus containing the statement that such lands contained oil and formations including oil," was properly modified by striking out such sentence, as misleading, in reference to the contents of the prospectus, and as argumentative and trenching upon the province of the jury. (Id.)
22. **EXPLOSION OF DYNAMITE AT DWELLING—PROVINCE OF JURY—SUPPORT OF VERDICT.**—Where the defendant was charged with the offense of the explosion of dynamite at a dwelling with intent to injure and kill an inmate, and was convicted thereof, the jury is the sole judge of all questions of fact, and its finding based upon evidence upon any controverted question is conclusive on this court. It is held, upon a statement of the evidence, that it is not only sufficient to support the verdict, but that it is persuasive, satisfactory and convincing as to the guilt of the defendant. (People v. Burke, 72.)
23. **SUFFICIENCY OF INDICTMENT FOR EXPLOSION OF DYNAMITE AT DWELLING.**—An indictment under section 601 of the Penal Code, charging that defendant, on a specified date and in a specified county, "did willfully, unlawfully, feloniously and maliciously deposit and explode at, in and near a dwelling-house, being a tent-house and place where human beings did then and there and theretofore usually inhabit, assemble and frequent, pass and repass, dynamite, Hercules powder, and other chemical compounds and explosives, with the intent then and there to injure Lu Smith, a human being, and that by means of said deposit and exploding of said explosives, said Lu Smith was thereby injured and endangered," sufficiently states the offense, and meets all of the requirements of the Penal Code, and a demurrer thereto was properly overruled. (Id.)
24. **LOCATION OF TENT-HOUSE—IDENTIFICATION OF CRIME—PROTECTION FROM FURTHER PROSECUTION—PROOF OF PARTICULARS.**—Though the location of the tent-house might have been more definitely stated, yet, in so far as locality is concerned, it was sufficient under the indictment to aver that the offense was committed in the county. This, in connection with the name of the person injured, and the substantive averments of the crime, makes the identification thereof complete, which not only answers every purpose of good pleading, but would also protect the defendant from any future prosecution for the same offense, at the time set forth, at any place within the jurisdiction of the superior court of the county, upon which, under

CRIMINAL LAW (Continued).

a plea of "once in jeopardy," defendant may show the particulars of the former offense to identify the same by extraneous evidence. (Id.)

25. **EVIDENCE—GOOD REPUTATION OF DEFENDANT FOR PEACE AND CHASTITY—PROPER CROSS-EXAMINATION—HEARING OF CONTRARY PARTICULARS.**—Witnesses offered to show the good reputation of the defendant for peace and chastity were properly asked by the district attorney on cross-examination if they had not heard that the defendant, as a physician, had made a practice of committing abortions, and as to his having improper intercourse with women, and taking undue liberties with female patients. Such questions were properly permitted by the court, as affecting the weight of the testimony as to defendant's reputation. (Id.)
26. **RULE AS TO SCOPE OF CROSS-EXAMINATION OF CHARACTER WITNESSES.**—The rule is that on cross-examination of character witnesses, they may be asked as to specific reports concerning the trait of character involved, if they have a tendency to establish the bad reputation, although they may not be sufficient for that purpose. (Id.)
27. **QUESTION DISALLOWED—INDICTMENT OF DEFENDANT IN ANOTHER COUNTY—MISCONDUCT NOT ESTABLISHED—PRESUMPTION UPON APPEAL.**—The fact that the court disallowed a question asked by the district attorney of a character witness for defendant whether he had not heard that the defendant was indicted in another county does not establish misconduct of the district attorney in asking it, in the absence of any showing that he asked it in bad faith. It must be presumed upon appeal that the district attorney was conscientiously discharging his duty as he understood it. (Id.)
28. **LIMITING NUMBER OF CHARACTER WITNESSES—DISCRETION NOT ABUSED.**—It is held that the court did not abuse its discretion in limiting the number of character witnesses to thirteen, when no evidence was offered by the prosecution to impeach that reputation. There must necessarily be a limit to such inquiries, and it is for the court to prescribe it in such manner that it is not likely that any additional witnesses would add weight to the large number of unimpeached and uncontradicted witnesses introduced. (Id.)
29. **DATE OF ILLICIT RELATIONS BETWEEN PROSECUTRIX AND DEFENDANT—IMPEACHMENT ON CROSS-EXAMINATION—EXPLANATION ON REDIRECT EXAMINATION.**—Where the prosecutrix had stated on direct examination that her sexual intercourse with defendant began at Oakland in June, 1906, and she was impeached on cross-examination by her evidence before the grand jury that in April, 1906, defendant, at his sanitarium, "did things that no physician should do with a patient," she was properly allowed on redirect examination to answer the question, "What were these things?" by way of ex-

CRIMINAL LAW (Continued).

planation, and to state facts and circumstances tending to correct or repel any wrong impressions or inferences arising from the matter drawn out on cross-examination, though defendant's case may be prejudiced thereby. (Id.)

30. **EXPRESSED MOTIVE IN PROCURING DYNAMITE FROM MINE—PROPER EVIDENCE—PRIOR SELF-SERVING DECLARATIONS—HEARSAY.**—The statement made by the defendant at the time when he procured the dynamite from a mine in Butte county, which was subsequently exploded at the tent of the prosecutrix, as to his then expressed purpose and motive in procuring it, was admissible, as calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction. But prior self-serving declarations to third persons made several days before the visit to the mine, which were no part of the *res gestae*, were properly excluded as inadmissible hearsay. (Id.)
31. **INDUCEMENT TO PROSECUTRIX TO LEAVE STATE—PAYMENT BY AGENT FOR DEFENDANT—CIRCUMSTANTIAL PROOF—QUESTION FOR JURY—ADMONITION.**—The court properly admitted evidence that a woman named, who had no money of her own, paid \$750 to the prosecutrix to leave the state before the trial of the defendant, and it is held that all of the circumstances proved warranted the reasonable inference that she was the agent of the defendant in inducing such departure from the state, and that the court properly submitted the whole of the evidence to the jury, with the admonition, "Unless you are satisfied from all the evidence in the case that the defendant did cause or authorize the persuasion or disappearance of such witness, you cannot consider it as a circumstance against the defendant." (Id.)
32. **PROPER EVIDENCE OF WITNESS ACQUAINTED WITH WOMAN.**—The evidence of a witness acquainted with such woman for several years, and who had opportunity to know the facts, was properly admitted to show her movements and financial condition, which were material and relevant matters. In weighing such testimony, the court or jury should consider the means of knowledge of the witness, and all facts tending to illustrate his credibility and the weight of his testimony. (Id.)
33. **CONSPIRACY—CIRCUMSTANTIAL EVIDENCE—INFERENCE OF JURY.**—In proving a conspiracy, it need not be shown that the parties actually came together and agreed to enter into and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from proof of the facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole. (Id.)

CRIMINAL LAW (Continued).

34. **ILLEGIT RELATIONS OF PROSECUTRIX WITH OTHER PERSONS—PARENTAGE OF CHILD.**—Where a child was shown to have been born from the prosecutrix, which she testified was the result of her illicit relations with defendant, who as a physician attended its birth, the court properly confined questions as to her illicit relations with other men to a period of time bearing solely upon the question of the parentage of the child, as to which there was no contrary evidence. She could not be impeached by evidence of prior particular wrongful acts, not bearing upon such parentage nor questioned in relation thereto. (Id.)
35. **CLAIM BY DEFENDANT OF POSSESSION OF ORIGINAL DYNAMITE—REBUTTAL—EVIDENCE OF SUBSTITUTION.**—Where the defendant claimed to have kept the original dynamite purchased at the mine and to have it on the premises, it is held that there was sufficient proof in rebuttal that the dynamite upon the premises was purchased since the explosion of the other dynamite at the tent of the prosecutrix, and was substituted therefor, and that such substitute was procured by an agent of the defendant acting in his behalf. (Id.)
36. **PROPER EXHIBITION OF CHILD IN COURT BY PROSECUTRIX—PROVINCE OF JURY—QUESTION OF SIMILARITY TO DEFENDANT.**—The prosecutrix had the right to bring her child with her into court, and to have it in her arms when testifying to its paternity by the defendant. In view of the question as to its paternity, it was proper to submit the child to the inspection of the jury, who were the judges as to whether or not it resembled the defendant, and unless such resemblance existed, its production in court would be in the defendant's favor. (Id.)
37. **EVIDENCE—GENEROUS DISPOSITION OF DEFENDANT.**—The court did not err in rejecting evidence as to the generous disposition of the defendant. Such incidental and remote traits of character are not involved in the proper evidence of character. (Id.)
38. **MENTAL CONDITION OF PROSECUTRIX—INQUIRY NOT RESTRICTED.**—It is held that the superior court did not improperly restrict the cross-examination of the prosecutrix as to her mental condition, and that there was no restriction or denial of the defendant's right to the broadest inquiry of witnesses as to her sanity. (Id.)
39. **EVIDENCE OF OTHER OFFENSES—CONNECTION WITH OFFENSE CHARGED.**—Whenever there is a clear and logical connection between two or more offenses and the offense charged, either as bearing upon the motive for that offense or as indicating the guilt of the defendant in committing the same, the evidence of such other offenses is admissible against the defendant. (Id.)
40. **OFFENSES INDICATING MOTIVE.**—Evidence of the illicit relations between the defendant and the prosecutrix and the parentage of the

CRIMINAL LAW (Continued).

- child were clearly admissible as bearing upon the motive of the defendant to commit the offense charged. (Id.)
41. **OFFENSES INDICATING CONSCIOUSNESS OF GUILT OF OFFENSE CHARGED.** The offenses of subornation of perjury, and the preparation of false and substitute evidence to indicate the continuous possession of the dynamite which was exploded at the tent of the prosecutrix, and of inducing the prosecutrix to leave the state, and of defendant's attempt to poison her after the commission of the offense charged, all indicate the defendant's consciousness of his guilt of that offense. (Id.)
42. **WRITTEN STATEMENT OF PROSECUTRIX FOR USE ON CROSS-EXAMINATION—ERROR NOT APPEARING.**—No prejudicial error appears in the action of the court in declining to order the district attorney to deliver to defendant's counsel a written statement of the prosecutrix prepared to be used on the district attorney's cross-examination of the sheriff, when the sheriff was not asked concerning it, and it does not appear that he had seen it, nor was it demanded on the examination of the prosecutrix, and where, without reference to whether it could be used on cross-examination or not, its contents do not appear in the record on appeal. (Id.)
43. **FOUNDATION NOT LAID FOR IMPEACHMENT.**—Where a document, in so far as it appears material, could only be used on cross-examination to impeach the witness, but no foundation was laid for such impeachment, he cannot complain of the court's action in that regard. (Id.)
44. **DEFENSE OF ALIBI—PROPER EVIDENCE NOT RESTRICTED—OPINION—DECLARATIONS NOT PART OF RES GESTAE.**—It is held that the court did not restrict any proper evidence offered in support of the defense of alibi of the defendant when the explosion took place, but it properly sustained an objection to certain questions calling for the opinion or conclusion of the witness, and also properly excluded his declarations which were not part of the *res gestae* of the explosion which caused the injury, but were made at a different time and place, which could in no way be considered a part of the transaction. (Id.)
45. **EXPERT EVIDENCE—MOST PRACTICAL WAY TO REMOVE ROCKS—QUESTION FOR JURY.**—A witness qualified as a mining engineer was properly held not thereby entitled to state from his experience "what would be the most practical way to remove those rocks" from defendant's ground, for the reason that this was not the subject of expert testimony, but was a matter for the jury to determine from evidence explaining the situation as to the rocks. (Id.)
46. **SECRECY OF DEFENDANT IN OBTAINING DYNAMITE FROM MINE—PROVINCE OF JURY.**—It is held that a question as to whether there was "any secrecy" about the defendant's "statements or movements

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- or his actions in connection with the getting of the powder," which was obtained from the mine, called for an inference or conclusion within the exclusive province of the jury. (Id.)
47. **REQUEST NOT TO TELL "AT ANY TIME."**—It is held that a question as to whether defendant said anything at the mine "at any time while he was there, asking you not to tell about giving the powder," would not be admissible. The question should have been limited to the time when defendant procured the dynamite. (Id.)
48. **ARGUMENT OF DISTRICT ATTORNEY—WIDE RANGE TO BE ALLOWED.**—In the argument of the district attorney before the jury, the range of discussion, illustration and argument is properly very wide. Matters of common knowledge and historical facts may be referred to and interwoven in such argument; and allusion may be made to the prevalence of crime and the duty of the jury. He may express his belief as to the guilt of the defendant, and that the facts are sufficient to convince anyone of his guilt. (Id.)
49. **ALLUSION IN ARGUMENT TO PEOPLE OF STATE—ABSENCE OF PREJUDICE—CORRECTION BY COURT.**—Where the district attorney alluded in his argument to a law that is "equal for the rich and the poor," the proper administration of which "will enjoy the confidence and deserve the reverence of the people of our state," and then stated: "To-night the people of the state look here to you. They are not looking here to find out whether or not the defendant is guilty. They have conceded that he is. They are looking here to find out if a court of justice is to declare him so,"—it is held that if such remarks be considered improper, it must be presumed that any injurious effect was forestalled or removed by the ruling of the court that "that statement as to what the people or other persons think about it is to be disregarded by the jury." (Id.)
50. **PROPER INSTRUCTION—GUILT BASED UPON PERSONAL ACT, OR UPON BEING ACCESSORY.**—The court properly instructed the jury that "if you are satisfied from the evidence beyond a reasonable doubt and to a moral certainty that the crime charged in the indictment was directed by the defendant, it would be your duty to find him guilty. So, too, if you should be likewise satisfied from the evidence in the case that the explosive was deposited and exploded by some other person whose identity is unknown, and you should also be satisfied from the evidence beyond a reasonable doubt that the defendant was concerned in the commission of such crime as above explained, but that he did not directly commit the act constituting the offense, but aided and abetted in its commission, or not being present, advised and encouraged its commission, you should likewise return a verdict of guilty." (Id.)
51. **DISTRICT ATTORNEY NOT REQUIRED TO ELECT—PROPER INDICTMENT AS PRINCIPAL—PROOF OF EITHER RELATION.**—The district attorney

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is not required to elect whether he will prosecute or ask for a conviction upon the ground that the defendant is the principal or an accessory before the fact; but he may ask for a verdict if the evidence satisfies the jury under either alternative, if there is evidence that the crime was actually committed. Since the defendant can be charged in the indictment as principal, whether he actually committed the offense or was an accessory thereto before the fact, he can be justly convicted thereunder if the evidence shows that he acted in either relation. (Id.)

52. **ABSENCE OF ERROR IN INSTRUCTIONS OR TENABLE GROUND OF REVERSAL.**—It is held that there was no error in the instructions of the court, and that there is no tenable ground for interfering with the verdict of the jury or with the judgment of the trial court. (Id.)
53. **INEBRIETY—AFFIDAVIT FOR ARREST—SUFFICIENCY—HABEAS CORPUS.** An affidavit for arrest, under section 2185c of the Political Code, enacted in 1911 (Stats. 1911, p. 396), which states that the person to be arrested "is so far addicted to the intemperate use of stimulants as to have lost the power of self-control; that by reason thereof said person is a fit subject for commitment to a state hospital for the care and treatment of the insane, and ought to be confined therein as an inebriate, under the provisions of section 2185c of the Political Code," corresponds substantially with the language of the statute, and cannot be held so deficient in showing that he belongs to a class contemplated thereby as to entitle him to be discharged on *habeas corpus*. (In re Henley, 1.)
54. **LOSS OF SELF-CONTROL—FACT INFERRED FROM FACTS OBSERVED—MATTER OF KNOWLEDGE OR OBSERVATION.**—The loss of the power of self-control and the intemperate use of stimulants are facts, though the knowledge of them may be the result of inference from other known facts; but they are so intimately connected with the observation of the appearance or conduct of the person as to be properly placed within the category of knowledge or observation, rather than of opinion. They do not require the exercise of judgment so much as the faculty of perception. (Id.)
55. **OPINION AS TO "INEBRIETY" DEDUCED FROM FACTS OBSERVED—ULTIMATE FACT—EXCEPTION AS TO "MATTER OF OPINION."**—If the statement in the affidavit of arrest that the accused is an "inebriate" is to be regarded as the statement of an opinion, it is merely the statement of an ultimate fact, deduced from facts observed as to the habits of the accused as to "intoxication," and if the conclusion as to the ultimate fact involves matter of opinion, it falls within an exception to the general rule as to "matter of opinion" as thoroughly established as the rule itself. (Id.)

CRIMINAL LAW (Continued).

56. **RIGHT OF ADMISSION TO BAIL PENDING EXAMINATION—SHOWING OF DANGER TO SAFETY REQUIRED.**—Unless there is an affirmative showing of danger to the safety of one or to society in allowing the accused to be admitted to bail, he is entitled, under section 6 of article I of the constitution, to be admitted to bail until a hearing and examination can be had. (Id.)
57. **SELLING AND GIVING INTOXICATING DRINK TO MINOR UNDER EIGHTEEN—SUFFICIENCY OF COMPLAINT—EXCEPTION OF PERSONS NOT NEGATIVED.**—A complaint in a justice's court, under section 397b of the Penal Code, charging the defendant with selling and giving to a minor child under the age of eighteen years an intoxicating drink, is not insufficient, because it fails to negative the exception stated therein, "that this section shall not apply to the parents of such children, or to guardians of their wards." The language of such exception in no wise purports to describe the offense specified, or to make such exception a part of the definition of the offense. (Application of Hemstreet, 639.)
58. **QUALIFICATIONS OF RULE AS TO NEGATIVING EXCEPTIONS IN CRIMINAL PLEADING—EXCEPTION NOT PART OF OFFENSE—MATTER OF DEFENSE.**—The application of the rule requiring a criminal pleading to negative exceptions found in the statute should not be extended to include cases where it does not clearly appear that the exception constitutes a part of the enactment defining the offense; and when the exception is not a part of the definition of the offense, and in this way does not become a part of the enacting clause, its existence is a matter of defense. (Id.)
59. **RENDITION OF CRIMINAL JUDGMENT IN JUSTICE'S COURT—LAPSE OF TWO DAYS SUCCEEDING VERDICT—JURISDICTION—CURE OF ERROR—NEW TRIAL.**—The rendition of a judgment in a criminal case in the justice's court more than two days succeeding the verdict was not an act in excess of jurisdiction, but was merely an error in procedure, which defendant was entitled to have reviewed upon appeal and a new trial granted on account of such error, and where he availed himself of his right to appeal to the superior court, which granted him a new trial, wherein judgment was properly rendered, he was thereby protected in every right to which he was entitled. (Id.)
60. **HABEAS CORPUS.**—Where the defendant was properly convicted both in the justice's court and in the superior court upon appeal, he is not entitled to discharge upon writ of *habeas corpus* on account of any procedure had in the justice's court. (Id.)
61. **ATTEMPT TO COMMIT GRAND LARCENY—NATURE AND PROOF OF CRIME CHARGED.**—Under a charge of an attempt to commit grand larceny, when the *animus furandi* exists, followed by acts apparently affording a prospect of success, and tending to render the commission of

CRIMINAL LAW (Continued).

the crime effectual, the accused brings himself within the letter and intent of the statute. When there is a person from whom the property may be taken, an intent to take it against the will of the owner, and some act performed tending to accomplish it, the crime is committed, whether the property could in fact be taken or not. (*People v. Paluma*, 131.)

62. **NATURE OF ATTEMPT TO COMMIT CRIME.**—An attempt to commit a crime, in general, involves an intent and endeavor to accomplish a crime, carried beyond mere preparation, and combined with an act which falls short of the thing intended. Mere intention to commit a specific crime does not of itself amount to an attempt to commit it; but there must be, in addition to the wicked intent, some act done toward its ultimate accomplishment. (*Id.*)
63. **SUPPORT OF VERDICT FOR OFFENSE CHARGED.**—It is held, upon a review of the evidence, that it is sufficient to support the verdict of conviction of the defendant of the crime of an attempt to commit grand larceny as charged in the information. (*Id.*)
64. **GRAND LARCENY—PRIOR CONVICTION—ALIBI—EVIDENCE OF IDENTITY—CROSS-EXAMINATION—REDIRECT—PRIOR IDENTITY BY PHOTOGRAPH.** Where, upon a prosecution for grand larceny, the defendant had pleaded guilty to an alleged prior conviction, and relied upon an *alibi*, and sought upon cross-examination of the prosecuting witness to weaken and break his testimony as to the identity of the defendant, who had immediately disappeared after the larceny, and was arrested for the crime one year thereafter in Portland, Oregon, the court properly allowed the witness to testify on redirect examination that the next day after the discovery of his loss he complained to the police department, where he was shown photographs of former criminals, one of which he immediately recognized as that of the defendant. (*People v. Ferrara*, 271.)
65. **GROUND OF ADMISSIBILITY OF IDENTIFICATION BY PHOTOGRAPH—CREDIBILITY OF EVIDENCE—CORROBORATING PROOF.**—The proof as to the identification of the defendant's photograph was admissible not to show the identity of the accused as the guilty party, for which purpose it would be incompetent, but rather to establish the truth and credibility of his evidence that, after the defendant's arrest, he could and did identify him as the guilty party. The evidence of the officer, who made the arrest, was also admissible to corroborate the defendant's evidence as to the identification of his photograph made in such officer's presence in the police department. (*Id.*)
66. **REMARK OF COURT IN ADMITTING EVIDENCE AS TO PHOTOGRAPH—ABSENCE OF OBJECTION—POSSIBILITY OF INJURY WAIVED.**—Where the court remarked upon admitting the testimony of the prosecuting witness as to the photograph of defendant found in the

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office of the police department that perhaps the picture was found at a place where it had no right to be, no objection having been taken to such remark at the time, the possibility of injury to the defendant therefrom cannot be considered. (Id.)

67. **REFERENCE IN TESTIMONY OF OFFICER AS TO PRIOR TROUBLE OF DEFENDANT—DEFENDANT NOT PREJUDICED.**—A reference in the testimony of the arresting officer, who corroborated the evidence of the defendant as to the identification of defendant's photograph, to the fact that the defendant had been in trouble before, could not prejudice the defendant, he having by his plea of guilty to a prior conviction, injected that matter into the case, so that there was no violation of section 1025 of the Penal Code by the prosecution. (Id.)
68. **CHARGE OF MURDER — PROPER CONVICTION OF MANSLAUGHTER — INSTRUCTIONS AS TO MURDER IN FIRST AND SECOND DEGREE NOT PREJUDICIAL.**—Where a defendant charged with murder was properly convicted of manslaughter under the evidence, he cannot be prejudiced by alleged errors in instructions given with reference to murder in the first and second degree of which he was acquitted. It is therefore unnecessary to consider a specification of error in refusal to charge that such higher offenses were not made out (People v. Chutuk, 768.)
69. **PROPER INSTRUCTION AS TO NATURE OF OFFENSE—KILLING CAUSED BY BLOW—"ADEQUATE PROVOCATION."**—Where the killing was caused by a blow with the fist on the side of the jaw and neck of the deceased, in the heat of passion, the court properly instructed the jury that "when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter," but that "if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation, which is not produced by opprobrious or contemptuous actions or gestures, without assault upon the person or trespass against lands or goods." (Id.)
70. **INSTRUCTIONS PROPERLY PRESENTING A QUESTION OF FACT FOR THE JURY.**—It is held that these instructions and other similar instructions as to the intent with which the blow was struck presented a question of fact for the jury, and were not improper, and that the court properly refused directly to instruct the jury as to the intent with which the blow was struck, which was a question for the jury. (Id.)
71. **EFFECT OF INSTRUCTIONS TAKEN TOGETHER.**—It is held that taking the instructions together, they fairly presented the law to the jury,

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and that there was nothing therein which could have a tendency to mislead the jury or to prejudice the rights of the defendant, either as to the law of self-defense, or the subject of reasonable doubt, and that there was no prejudicial error in the giving or refusal of any instructions. (Id.)

72. **UNWARRANTED CRITICISM OF ACTION OF DISTRICT ATTORNEY.**—It is held that a criticism urged by defendant of the action of the district attorney is unwarranted; and that there is nothing in the record indicating any improper statement made by the district attorney, not based upon proper and logical inferences from the testimony adduced. (Id.)
73. **MURDER—CONVICTION OF MANSLAUGHTER—KILLING OF FLEEING FELON—CRIMINAL NEGLIGENCE NOT ESTABLISHED—VERDICT UNSUPPORTED—REVERSAL.**—Upon a prosecution for murder, where the defendant was convicted of manslaughter and the evidence establishes without conflict that the deceased had committed a felony and was fleeing from the pursuit of citizens with a view to apprehend him, of which defendant was one who commanded him to halt, which he refused to do, whereupon defendant fired the fatal shot, it is held that the evidence wholly fails to establish any criminal negligence on defendant's part, which must be proved beyond a reasonable doubt, to warrant the verdict, that there is no evidence warranting the conviction, and that the judgment must be reversed. (People v. Lillard, 343.)
74. **JUSTIFIABLE HOMICIDE.**—Under section 197 of the Penal Code, homicide is justifiable when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed; and the general rule is that even a private person is justified in killing a fleeing felon who cannot otherwise be taken if he can prove that the person is actually guilty of a felony. (Id.)
75. **MURDER—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—INCONSISTENCIES OF WITNESS TO CRIME.**—Where, upon a prosecution for murder, the verdict was evidently based mainly upon the evidence of the brother of the deceased, as an eye-witness of the crime, it is held that, notwithstanding inconsistencies in his statement as to matters of detail, it cannot be said that there was anything in his testimony as to the homicide from which the reviewing court could justly conclude that his entire testimony is *per se* unbelievable, and could not, if accepted in the main by the jury, warrant their verdict as against the defendant's story of self-defense. (People v. Haydon, 543.)
76. **TEST OF INCREDIBLE TESTIMONY.**—Testimony, in order to bear upon its face such improbability as to render it unbelievable, must involve a claim that something has been done that it would not seem possible could be done, under the circumstances described, or involve conduct that no sane person would be likely to do. (Id.)

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77. **PROVINCE OF APPELLATE COURT AND OF JURY.**—Appellate courts are not authorized to review the evidence, except when, upon its face, it may be justly held that it is insufficient to support the ultimate issue involved, in which case it is not an issue of fact, but purely one of law. Such courts are in no position to determine the credit of witnesses, or to weigh their testimony, which is the sole province of the jury in a criminal case. In the present case, the jury were authorized, in the discharge of their duty, to accept the testimony of the brother of deceased as to the facts of the homicide, however weak it may be in other respects, and to reject any evidence contrary to his testimony as to such facts. (Id.)
78. **INAPPLICABILITY OF AMENDMENT OF CONSTITUTION TO REVIEW OF CONFLICTING EVIDENCE.**—The recent amendment of the state constitution by adding section 4½ of article III thereof (Stats. 1911, pt. II, p. 1778), prohibiting reversals in criminal cases for error, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," is inapplicable where no error appears in the case upon any question of law, and the verdict is sustained upon conflicting evidence. (Id.)
79. **CONSTRUCTION OF AMENDMENT—PROVISION OF CONSTITUTION LIMITING APPELLATE COURTS TO "QUESTIONS OF LAW" UNAFFECTED.**—The appellate court deems it certain that "said amendment was not intended to change, nor has it changed, the very sensible rule prescribed by the constitution, and for so many years adhered to in this state, that, in the exercise of their appellate jurisdiction, the appellate courts are restricted to the consideration of questions of law alone, and that therefore, as before stated, the matter of evidence does not constitute a subject of review by those tribunals except where there necessarily arises from the evidence, or is presented thereby, from its very nature, a question of law. (Id.)
80. **COMMENT BY SUPREME COURT IN ORDER DENYING REHEARING.**—In the order of the supreme court denying a rehearing, in this case, that court commented thus on the foregoing statement of law: "This court regards this statement as wholly unnecessary to the decision of the case. The denial of the petition for a rehearing is not to be construed as an indication of approval or disapproval of said statement by the supreme court." (Id.)
81. **EVIDENCE—POSTAL CARD AS TO STRAYING CATTLE.**—It is held that there was no error prejudicial to the defendant in the admission in evidence of a postal card received by the father of deceased from the owner of an adjoining range as to the whereabouts of his cattle, and on which the father, addressing his sons, had written a request that if they saw the writer, to "thank him for telling us." (Id.)

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82. **CROSS-EXAMINATION OF BROTHER OF DECEASED—WOUND RECEIVED—RELATIVE POSITION—ERROR WITHOUT PREJUDICE.**—It was error to reject a question asked on cross-examination of the brother of deceased as to whether his position was not on the left-hand side of defendant when he received two wounds in his right arm, for the purpose of making it appear that the shots were accidental, when he was firing at deceased, merely on the ground that the question was "purely argumentative"; but it is held that, in view of other evidence, the error was wholly without prejudice. (Id.)
83. **ADMISSION OF BLOODY GARMENTS OF DECEASED—CORROBORATION OF WITNESS FOR PROSECUTION—INTENTION OF MORTAL WOUND.**—The court did not err in admitting in evidence for the prosecution the bloody over and under shirts worn by deceased at the time of the fatal shot, as part of the case for the prosecution, in corroboration of the evidence of the brother of deceased as to the homicide, and to show that the shot fired by defendant took effect in a vital part of the body, as indicated by the garments, and the intention of defendant to inflict a mortal wound. (Id.)
84. **SUSTAINING BURDEN OF PROOF—PEOPLE NOT REQUIRED TO ANTICIPATE POSITIONS OF DEFENDANT.**—The people, in the maintenance of the burden upon them of proving the guilt of the defendant, are not bound to anticipate the contentions or concessions, if any, which the defendant intends to make, or to assume that certain matters or theories supporting the hypothesis of guilt will not be disputed by defendant. (Id.)
85. **ABSENCE OF DEFENDANT FROM CORONER'S INQUEST—EVIDENCE NOT PREJUDICIAL.**—It was not prejudicial to the defendant for the prosecution to prove that he was not present at the coroner's inquest held at the scene of the homicide, as there could be no implied concession on his part of guilt, in such case, as there might be if he were present and silent thereat. (Id.)
86. **BAD REPUTATION OF DECEASED FOR PEACE AND QUIET—PROPER CROSS-EXAMINATION—LOCAL FACTIONAL DISPUTE.**—Where evidence was introduced to show that the reputation of the deceased for peace and quiet in the community where his family resided was bad, it was proper to allow the district attorney to ask, on cross-examination, whether such reputation was not owing to a local factional fight on the liquor question, not involving any other question, although the deceased is not shown to have belonged to one of those factions. (Id.)
87. **CROSS-EXAMINATION OF WITNESS FOR DEFENDANT—INTOXICATION DURING TRIAL.**—It may be shown from the cross-examination of a witness for the defendant that he was, during practically all of the time of the trial, under the influence of intoxicating liquors, as bearing upon the witness' memory or want of memory as to the

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testimony given by him, where the cross-examination showed justification for the inquiry. (Id.)

88. **EVIDENCE OF GOOD CHARACTER OF DECEASED FOR PEACE AND QUIET — IMPROPER CROSS-EXAMINATION — ASSAULT UPON HONESTY AND INTEGRITY.**—Where a witness had testified to the general good reputation of the deceased for peace and quiet, in a place where he lived for three years, it was not admissible to inquire on cross-examination as to incidents affecting his honesty and integrity. Such inquiry was not relevant for any purpose. The true rule as to character evidence, in a criminal case, is that it should be confined to the trait of character in issue, and should bear some analogy and reference to the nature of the charge. (Id.)
89. **UNFRIENDLINESS OF WITNESS FOR DEFENDANT TOWARD FAMILY OF DECEASED—CROSS-EXAMINATION AS TO ENMITY—IMPEACHING EVIDENCE.**—Where defendant admitted unfriendliness toward the family of the deceased, but denied positive hostility, on cross-examination the prosecution had the right to lay the foundation for impeaching evidence that he was so hostile to them that he had stated that he had leased land to the defendant in order that he might kill the sons if they drove his horses off of the range. The fact that such impeaching evidence had a far-reaching effect against the witness is not a ground upon which impeaching evidence may be excluded, the only remedy being to have its effect limited by an instruction. (Id.)
90. **ABSENCE OF PREJUDICIAL ERROR IN RULINGS OF COURT.**—It is held that no prejudicial error appears in the rulings of the court upon the admission or exclusion of evidence, and that no ground appears in the record for a reversal of the judgment and order appealed from. (Id.)
91. **IMPANELING JURY—PEREMPTORY CHALLENGES—PANEL DEPLETED—PREJUDICIAL ERROR NOT SHOWN.**—Though it is the usual and better practice to have a full panel in the jury-box, in a criminal case, before requiring the exercise of peremptory challenges, yet where a full panel had been sworn on their *voir dire*, and four of them had been excused as disqualified, and no prejudice appears to the defendant, in such case, from being required to exercise peremptory challenge upon the remainder of the panel, and there being no code provision or express ruling of the supreme court applicable to such facts, it is held that no reversible error was committed. (People v. Harrison, 288.)
92. **CHALLENGES TO JURORS FOR CAUSE—ERRONEOUS IMPRESSIONS AS TO LAW—CONFLICT—GUIDANCE BY INSTRUCTIONS—PROPER DISALLOWANCE.**—An impression in the mind of one juror, due to an erroneous idea as to the failure of the defendant to take the stand as a witness, and an impression in the mind of another juror, due to an

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erroneous idea as to the presumption of innocence with which the law clothes the defendant, does not necessarily show a disqualification of either of such jurors for cause, where the evidence in each matter is conflicting, and each of said jurors stated on cross-examination that he would be guided as to the matter wholly by the court's instructions. In such case each challenge for cause was properly disallowed. (Id.)

93. **EVIDENCE—OBJECTION TO PROSECUTRIX AS INCOMPETENT—EXPERT WITNESS—PRESUMPTION—EXAMINATION BY COURT—DISCRETION NOT DISTURBED.**—It appearing that the prosecutrix under a charge of statutory rape was fifteen years of age, she was, under the law, presumed to be competent to testify; and where her competency was objected to, and defendant offered an expert witness to the contrary, and a preliminary examination as to her competency was had by the court, out of the presence of the jury, and the court became satisfied from her understanding and answers that she was competent to testify, the discretion exercised in view of her answers, in favor of the presumption of competency, will not be disturbed. (Id.)

94. **PROPRIETY OF PRELIMINARY EXAMINATION OF WITNESS BY COURT.**—The preliminary examination of the witness, whose competency was objected to, by the court, was proper, and afforded the very best evidence upon which to determine the question of competency, which was matter solely for the trial judge to determine, as a question of law, preliminary to the admission of her testimony in evidence. The jury were not concerned with that question of law, and the court, in the exercise of its discretion, properly excluded it from hearing the evidence required to determine that question. It is only the evidence adduced at the trial that must be made in public and in the presence of the accused. (Id.)

95. **PROPER EXCLUSION OF EVIDENCE OF PHYSICIAN AT TRIAL—REMOTE EVIDENCE AS TO INCOMPETENCY.**—Where, after the court had determined the question of competency of the prosecutrix, and her testimony had been admitted in evidence, the defendant, as part of his case, offered the evidence of a physician, by whom it was proposed to show the condition of the girl's mind some two years before the introduction of her testimony in evidence, the court properly sustained an objection to such evidence as too remote. (Id.)

96. **EVIDENCE OF PHYSICIAN NOT ADMISSIBLE FOR IMPEACHMENT.**—The evidence of such physician was not admissible for the purpose of impeachment, for the reason that it is not one of the modes prescribed in sections 2051 and 2052 of the Code of Civil Procedure, for impeaching a witness. (Id.)

97. **STATUTORY RAPE—SINGLE PRELIMINARY EXAMINATION OF PERSONS SEPARATELY CHARGED—PART OF DEPOSITION OF DECEASED WITNESS.** The mere fact that two persons separately charged with the crime of

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statutory rape upon the person of the prosecuting witness were held to answer at one single preliminary examination, it appearing that the offenses were committed at about the same time and under the same surroundings, and that part only of the deposition of a deceased witness taken thereat related to the charge against the present defendant, cannot deprive the state of its rights, under section 686 of the Penal Code, to introduce such parts of the deposition as are competent evidence upon the trial of defendant. (Id.)

98. **REMAINDER OF DEPOSITION IN RECORD NOT PREJUDICING APPELLANT.** Under the rulings made upon the trial, the fact that the entire deposition is embodied in the record upon appeal, which shows clearly the parts admitted, cannot prejudice the defendant appealing. (Id.)
99. **STATUTORY RAPE—INTERCOURSE WITH STEP-DAUGHTER—SUPPORT OF VERDICT—UNCORROBORATED EVIDENCE OF PROSECUTRIX—PRESUMPTION—REVIEW UPON APPEAL.**—Where the defendant was accused of statutory rape by sexual intercourse with his step-daughter of the age of thirteen years, and was convicted upon her uncorroborated testimony, it is held that it must be assumed upon appeal, in the absence of anything appearing in the record to the contrary, that the jury reached their verdict with a full realization of their sworn duty, free from passion or prejudice, and also that the trial judge, who refused a new trial, was satisfied with the verdict, and that it cannot be said that a condition of the record appears which would warrant this court in interfering with the verdict. (*People v. Lewis*, 359.)
100. **REQUESTED INSTRUCTIONS PROPERLY REFUSED—DANGER OF CONVICTION UPON UNCORROBORATED EVIDENCE—CAUTION AS TO EVIDENCE LONG AFTER OFFENSE.**—The court properly refused requested instructions for the defendant, one of which stated that "in the absence of corroborating testimony, it is dangerous to find a verdict of guilty," and the other of which stated "that the testimony of children should be received with great caution, and this is especially the case when the children are of tender years, and the events they are relating happened a long time previous to the time they are on the stand," where it appears that the offense charged occurred in April, and the trial occurred in the following June, and the court gave proper cautionary and admonitory instructions. (Id.)
101. **CONSTRUCTION OF CHARGE OF COURT—LAW OF REASONABLE DOUBT—CONVICTION ON SOLE EVIDENCE OF PROSECUTRIX.**—Where the court fully instructed the jury as to the law of reasonable doubt, and that they "must find that each and every fact essential to conviction must be proved beyond all reasonable doubt and to a moral certainty," it is not necessary to repeat that law with every instruction, and it must be held implied in an instruction that "if the jury believe the prosecutrix, they can convict on her evidence alone." It

CRIMINAL LAW (Continued).

must be presumed that the jury understood from the instructions that they were not required to convict on the evidence of the prosecutrix unless convinced of the truth of her evidence beyond a reasonable doubt. (Id.)

102. STATUTORY RAPE—INTERCOURSE WITH YOUNG GIRL—SUPPORT OF VERDICT—ADMISSION OF GUILT—TESTIMONY OF PROSECUTRIX.—

Where the defendant was charged with the crime of statutory rape, by sexual intercourse with a young girl twelve years of age, of which he was convicted, it is held that evidence which justified the jury in believing that he admitted his guilt, taken together with the testimony of the prosecuting witness, which was direct and unmistakably established the charge, if believed by the jury, amply supported the verdict. (People v. Liggett, 367.)

103. SURPRISE BY WITNESS FOR PEOPLE—CONTRARY EVIDENCE ON PRELIMINARY EXAMINATION—IMPEACHMENT—RECORD NOT PROVED—IMMATERIAL CROSS-EXAMINATION.—

Where a witness for the people gave surprising evidence contrary to her evidence on preliminary examination, the record of such examination is not admissible as independent proof, but merely to lay the foundation for impeachment of her surprising evidence; but where the preliminary examination was not introduced, a question to the witness by defendant on cross-examination as to whether she was told by the parents of the child to testify as she did at the preliminary examination was immaterial. (Id.)

104. EVIDENCE OF PHYSICIAN—INTERCOURSE EFFECTED—RUPTURED

HYMEN—VENEREAL INFECTION.—Evidence of the physician who examined the young girl was admissible, for the purpose of showing that sexual intercourse had been effected, that she had a ruptured hymen, and that there were evidences of venereal infection. Each of these circumstances tended to show intercourse. (Id.)

105. EVIDENCE OF PRIOR UNCHASTE REPUTE OR CONDUCT INADMISSIBLE—ABSENCE OF SPECIFIC OFFER AS TO CAUSE FOR VENEREAL INFECTION.

Evidence that the prior reputation of the prosecutrix was bad in respect of chastity, or a mere offer to prove prior sexual intercourse of other persons with her, was inadmissible, and could not justify the defendant's intercourse with her while under the age of consent. Nor can such evidence be justified on the ground of the testimony of the physician as to her venereal infection, and that the defendant may now show that someone else "has done that act," in the absence of any specific offer to show that the venereal infection was or may have been caused by some other person than the defendant. (Id.)

106. PROPER INSTRUCTION AS TO TESTIMONY OF PROSECUTING WITNESS.

The court properly instructed the jury that "while it is the law that the testimony of the prosecuting witness should be carefully scanned,

CRIMINAL LAW (Continued).

still this does not mean that such evidence is never sufficient to convict, and if you believe the prosecuting witness, it is your duty to render a verdict of guilty." In this case the act of copulation constituted the offense, and the intent with which the defendant committed the act is immaterial. The prosecuting witness testified to the act, and if the jury believed her, his guilt would necessarily follow. (Id.)

107. INSTRUCTION AS TO REASONABLE DOUBT—ELABORATION UPON DEFINITION OF JUSTICE SHAW NOT APPROVED—REVERSAL NOT JUSTIFIED.—While it is not approved that trial courts should attempt any elaborate improvement upon the often approved definition of reasonable doubt given by Chief Justice Shaw, and the elaboration thereupon by the trial court is not an improvement, yet this court finds nothing in it to justify the reversal of the cause. (Id.)
108. ATTEMPT TO COMMIT ROBBERY—SUFFICIENT OVERT ACT.—It is held that the evidence in the record is sufficient to sustain a conviction for an attempt to commit robbery, since it shows more than mere act of preparation, and shows a sufficient overt act to constitute the crime charged. (People v. Moran, 209.)
109. CONFEDERATES IN CRIME—COMMITTER OF OVERT ACT NOT MATERIAL.—Where the whole case shows that defendants, jointly indicted for the same offense of attempting to commit robbery, were each responsible for the criminal acts of the other committed in furtherance of their joint enterprise, it is unimportant that the evidence in the record upon appeal in this case does not show which of the defendants committed the overt act. (Id.)
110. SEDUCTION UNDER PROMISE OF MARRIAGE—ESSENTIALS OF OFFENSE—SEDUCTION BY MARRIED MAN—IGNORANCE OF MARRIAGE ESSENTIAL.—Before the crime of seduction as defined by section 268 of the Penal Code is made out, it must appear that the prosecutrix has relied upon the promise of the accused that he will marry her. If the accused is a married man, it must appear that he seduced her under a promise of marriage, she not knowing that he has a wife, in which case the illegality of his promise does not excuse him; but if at the time of giving her consent she knew that the man was married, she is not excused for the surrender of her chastity to him by reliance upon his illegal promise. (People v. Wright, 171.)
111. CONFLICTING EVIDENCE AS TO KNOWLEDGE OF MARRIAGE—PREJUDICIAL ERROR IN REFUSING INSTRUCTION.—Where, upon a prosecution for seduction, the evidence is conflicting upon the question whether or not, at the time of the commission of the alleged offense, the prosecutrix knew that the defendant was a married man, it is prejudicial error, amounting to a miscarriage of justice, to refuse to instruct the jury that if the prosecutrix knew at such time that the defendant

CRIMINAL LAW (Continued).

was married, she was not justified in relying upon his promise to marry her. (Id.)

See Juvenile Court.

DAMAGES. See Bank, 1-7; Electric Company.

DEBTOR AND CREDITOR. See Account; Assignment; Guaranty.

DEED.

1. **CONFLICTING CLAIMS TO LAND—PLAINTIFF A BONA FIDE PURCHASER FROM COMMON GRANTOR, WITHOUT NOTICE OF PRIOR UNRECORDED DEED.**—In an action to determine conflicting claims to land, where the plaintiff and the defendants claim title under a common grantor, but it appears that plaintiff was a *bona fide* purchaser for value, under a recorded deed, without notice of a prior unrecorded deed, under which the defendants claim title, it is held that the evidence is amply sufficient to sustain the subsequent title of the plaintiff, as such *bona fide* purchaser. (Sears v. Douthitt, 774.)

2. **SUFFICIENT DELIVERY OF DEED TO PLAINTIFF—DELIVERY TO BANK AS AGENT OF PLAINTIFF.**—The delivery of the deed to the plaintiff, after the payment of the money to the common grantor, was sufficiently proved by its directed delivery to a specified bank as the agent of the plaintiff. Such bank could not have relinquished the deed upon request of the grantor without rendering itself liable to any damage sustained by the plaintiff because of such act. The deed so delivered was as effectual as though the grantor had handed it to the plaintiff, or to any other person authorized by plaintiff to receive it. (Id.)

See Quietting Title; Undue Influence.

DIVORCE.

1. **DIVORCE IN ANOTHER STATE—VACATING DECREE FOR FRAUD—JURISDICTION NOT LIMITED TO CODE PROVISION FOR OTHER RELIEF—MOTION WITHIN REASONABLE TIME.**—Where a divorce between a husband and wife was obtained in another state, an order obtained by the wife, upon notice to the husband, vacating the decree on the ground of fraud practiced both upon the court and upon the wife by the husband in its procurement, is not governed by a code provision of such state limiting the time for relief from a judgment for mistake, inadvertence, surprise or excusable neglect, but is governed by what the court may deem a reasonable time for relief on the ground of fraud. (Stierlen v. Stierlen, 609.)

2. **RULE IN THIS STATE AS TO VOID JUDGMENT.**—In this state a void judgment is not governed by section 473 of the Code of Civil Procedure. (Id.)

DIVORCE (Continued).

3. **COMMENT BY SUPREME COURT.**—The supreme court in denying a rehearing expresses its opinion that the foregoing statement is not necessary to the decision, and that in so far as it may be construed as applying to any judgment not void on its face, viz., on an inspection of the judgment-roll, its correctness is doubted, and approval is withheld therefrom. (Id.)
4. **INHERENT POWER OF COURTS OF GENERAL JURISDICTION TO RELIEVE FROM JUDGMENTS FOR FRAUD—QUESTION OF REASONABLE TIME—DISCRETION.**—The power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction, and the same may be exercised after the lapse of the statutory time for relief on other grounds, provided such motion is made within a reasonable time. What is a reasonable time for such relief on the ground of fraud is a matter of sound legal discretion in the court in which the motion is made. (Id.)
5. **DETERMINATION AGAINST LACHES OF WIFE IN MOVING TO SET ASIDE DECREE—CONCLUSIVENESS IN THIS STATE—SECOND MARRIAGE OF HUSBAND.**—Where the court of the state in which the decree of divorce was rendered, in setting aside the decree, held that the wife was not guilty of laches in making her application to set aside the decree on the ground of fraud of the husband in procuring the decree, that interpretation of the law of that state is conclusive upon the courts of this state, in which the validity of a second marriage by the husband is involved. (Id.)
6. **ACTION OF FORMER WIFE TO ANNUL SECOND MARRIAGE OF HUSBAND—ABSENCE OF LIMITATION DURING JOINT LIVES.**—Where the husband, after obtaining the fraudulent decree of divorce against his former wife, remarried in this state, after the annulment of such fraudulent decree such remarriage may be annulled at the suit of the former wife, without any other limitation than that, under section 53 of the Civil Code, such suit may be brought at any time during their joint lives; and the fact that it was not begun until nearly seven years after the entry of the decree of divorce is not imputable as laches. (Id.)
7. **ACTION FOR DIVORCE BY HUSBAND—CROSS-COMPLAINT BY WIFE—EXTREME CRUELTY—ELEMENT OF WRONGFULNESS ESSENTIAL—NECESSARY IMPLICATION SUFFICIENT.**—While, in a cross-complaint by the wife, in an action for a divorce by the husband, seeking a divorce from him on the ground of his extreme cruelty, the element of *wrongfulness* involved in the definition of "extreme cruelty" set forth in section 94 of the Civil Code must appear from its allegations, yet the cross-complainant is not required to adopt the precise language of the statute; but it is sufficient that the only rational inference from the acts of extreme cruelty specified and described in the

DIVORCE (Continued).

cross-complaint involves the necessary implication of *injustice or wrongfulness* on the part of the plaintiff. (Nelson v. Nelson, 602.)

2. **SUFFICIENCY OF CROSS-COMPLAINT—SHOWING OF "GRIEVOUS PHYSICAL AND MENTAL SUFFERING."**—Where the cross-complaint alleges that the plaintiff had treated the defendant "with extreme cruelty," which is followed by a specification of acts which necessarily imply unlawfulness, cruelty and brutality, and culminates in the positive averment that by reason of those acts specified the defendant and cross-complainant has suffered and does suffer great and grievous physical and mental suffering, it presents a clear case of the "wrongful infliction of grievous bodily injury and grievous mental suffering," within the meaning of section 94 of the Civil Code. (Id.)
9. **FINDINGS—STATUTORY REQUIREMENT—JUDGMENT FOR CROSS-COMPLAINANT UNSUPPORTED BY GENERAL FINDINGS.**—To satisfy the requirement of the law as to findings under a charge of extreme cruelty, there must be found at least some of the acts of cruelty specifically charged and embraced within the evidence, and also that these acts wrongfully inflicted upon the complainant grievous bodily injury or grievous mental suffering; and where the findings for the cross-complainant are merely of a vague and general character, without specifying acts of extreme cruelty alleged and proved, they are insufficient to support a judgment for the cross-complainant. (Id.)
10. **ALLEGATIONS OF CROSS-COMPLAINT NOT ADMITTED BY FAILURE TO ANSWER.**—None of the allegations of the cross-complaint for a divorce by the wife against the husband, constituting the grounds and conditions of divorce, are admitted by the failure of the husband to answer the same; but they must be substantially proved and found. A cause of action for a divorce must always be proved and found, and cannot be taken by default or admission. It constitutes a statutory exception, under section 130 of the Civil Code, to the general rule that facts not denied need not be found. (Id.)

EASEMENT. See Water and Water Rights, 1-3.

ELECTION.

1. **"LOCAL OPTION" IN SUPERVISORIAL DISTRICT—TIME FOR ELECTION—"PRIMARY ELECTION" NOT "GENERAL"—MANDAMUS FOR "SPECIAL ELECTION."**—The "primary election" held May 14, 1912, to choose nominees for the presidency at the national conventions of the respective political parties is not a "general election," within the meaning of the "local option" law of 1911, providing for the submission of the question "whether the sale of intoxicating liquors shall be licensed in a" specified "supervisorial district, outside of cities and towns," and where the board of supervisors, in violation of that law, fixed such "presidential primary election" as the time for holding such "local option election," *mandamus* will lie to com-

ELECTION (Continued).

pel the board to meet and rescind such order, and to call a "special election" in pursuance of said law within not less than thirty nor more than fifty days after the petition has been certified by the county clerk. (*Bigelow v. Board of Supervisors of the County of Sonoma*, 715.)

2. **TIME FIXED BY LAW FOR HOLDING "PRIMARY" NOT A TEST OF "GENERAL" ELECTION—ESSENTIAL DISTINCTIONS.**—The fact that the laws regulating "primary elections" held in May and September fix a regular time for the holding and recurrence of the same does not render such "primary elections" general elections. In order that an election must be "general" in the true sense employed by the legislature, the election must be one at which every qualified voter of the state, district, or division of the state, where required by law to be held, shall have the right to cast his ballot therein for whomsoever he pleases. But the primary election laws place limitations upon this right to the preference of candidates of a particular party, and take away the right when the registration expresses no party affiliation. (*Id.*)

ELECTRIC COMPANY.

1. **ACTION FOR REFUSAL TO FURNISH ELECTRICITY—WAIVER OF OBJECTION TO DEMAND—WAIVER OF RIGHTS UNDER LAW.**—In an action for damages for the wrongful refusal of the defendant to furnish electricity for plaintiff's use, where the defendant company made no objection to the form of plaintiff's demand, but presented an application for plaintiff's signature, which was in effect a contract containing several conditions, at least one of which the company conceded it was not entitled to require, it must be held to have waived any objection to the plaintiff's demand, and also to have waived any matters and things it would have been entitled to under the law applicable to such proposed contract. (*Thompson v. San Francisco Gas and Electric Company*, 30.)
2. **WAIVER OF RIGHT TO INSIST UPON DIFFERENT APPLICATION.**—Where the application presented for signature is in an agreement which contains a promise to abide by certain unreasonable and illegal rules and regulations adopted by the company, so that the applicant could not sign the same without being bound by the promise, the company, by presenting the application in that shape, waives the right to insist upon the application in any other form. (*Id.*)
3. **UNCONSTITUTIONAL AMENDMENT TO CODE AS TO PENALTY AGAINST CORPORATION AS TO ELECTRICITY—PENALTY NOT AN EXCLUSIVE REMEDY.**—Though plaintiff's action appears to be founded on section 629 of the Civil Code, providing for penalties against a corporation for its refusal to furnish electricity as therein provided, and that section as originally enacted in 1872 applied to a refusal of a corporation to furnish gas, and was then constitutional,

ELECTRIC COMPANY (Continued).

but was amended in 1905, by repeal and re-enactment, to include the same penalty for refusal of the corporation to furnish electricity, under the new constitution, which provided for electrical transmission lines by any natural person or corporation, and that section as amended failed by oversight to include penalties against a natural person, if it is unconstitutional for that reason, yet an action to recover the penalty is not an exclusive remedy. (Id.)

4. **ACTION FOR DAMAGES—REFUSAL OF ELECTRICITY BY CORPORATION—CAUSE OF ACTION.**—If the defendant which is a quasi-public corporation, enjoying the privilege under the constitution of using the public streets of the municipality for the location and maintenance of its conduits and transmission lines, wrongfully refused to furnish the plaintiff with any electricity, the plaintiff had a good cause of action against the defendant, independent of section 629 of the Civil Code, for whatever damages he may have suffered as the result of such refusal. (Id.)
5. **IMPROPER DEMURRER TO COMPLAINT—CAUSE OF ACTION FOR ORDINARY DAMAGES.**—Notwithstanding the plaintiff has stated a case within the terms of section 629 of the Civil Code, and if no cause of action is set forth thereunder, because of its unconstitutionality, still, where the complaint contains facts sufficient to state a cause of action for civil or ordinary damages in the sum of \$540, by reason of defendant's failure to give the service demanded, a demurrer to the complaint was improperly sustained, and should have been overruled. (Id.)

EMINENT DOMAIN.

1. **LANDS CONDEMNED FOR STREET WIDENING—ASSESSMENTS IN TREASURY—MANDAMUS—APPEAL PENDING NOT CONSIDERED—ABSENCE OF STAY.**—Where lands were condemned in an action for street widening, and the assessments were collected and paid into the city treasury, and there was no appeal from the judgment of condemnation, and the trial court decided in favor of the validity and regularity of the proceedings, and there was no stay pending an appeal involving such validity and regularity, a proceeding in *mandamus* to compel the payment of such funds in the treasury to the property owners cannot serve to review the correctness of the action of the trial court; and where the board of public works refused to draw warrants for such funds in favor of the property owners, pending such appeal, a peremptory writ of mandate will be granted to compel such action. (*Eberle v. Hubbard*, 704.)
2. **REHEARING—AFFIRMANCE OF JUDGMENT APPEALED FROM—PEREMPTORY WRIT.**—Where a rehearing was granted for further consideration, and pending such rehearing the judgment of the trial court as to the validity and regularity of the proceedings for con-

EMINENT DOMAIN (Continued).

demnation was affirmed upon appeal, and upon such rehearing the original opinion was adopted and approved, the peremptory writ of mandate must issue in accordance therewith. (Id.)

EMPLOYER AND EMPLOYEE.

1. **BOARD OF EDUCATION—STOREKEEPER EMPLOYED UPON MONTHLY SALARY—WANT OF POWER TO DISMISS DURING MONTH AND APPORTION SALARY.**—The board of education of the city and county of San Francisco, after employing a storekeeper from month to month upon a monthly salary, has no power to dismiss him without cause, pending any month, and to apportion his salary for such month to the part of the month preceding his dismissal, and thus deprive him of his full salary for such month. The only power of dismissal without cause is at the expiration of a monthly term of employment. (Ross v. Board of Education, 222.)
2. **RULE AS TO MONTHLY TERM OF EMPLOYMENT APPLICABLE—CONSTRUCTION OF CODE.**—The ordinary rule that an employee who is employed by the month is entitled to his salary for the full month, when he is discharged without cause before the expiration of the month, applies in case of employees of a school district or of a board of education; and there is nothing in section 1617 of the Political Code, defining their rights and duties, which exempts their contracts of employment of other persons than teachers from the operation of the ordinary rules of law applicable to the interpretation and enforcement of contracts of employment in general. (Id.)
3. **BREACH OF MONTHLY CONTRACT—ACTION FOR DAMAGES—REMEDY BY MANDAMUS.**—Though an action for damages would lie for breach of a monthly contract of employment by a board of education, yet as such remedy would not be equally as convenient, beneficial and effective as the remedy by *mandamus* to compel the board of education to draw upon the school fund for the residue of the salary wrongfully withheld by them in breach of their official duty from the salary of the storekeeper employed by them upon a monthly salary, that remedy will lie upon his petition therefor. (Id.)
4. **DISCHARGE WITHOUT CAUSE PROPERLY DETERMINED BY TRIAL COURT.** Upon petition for the writ of *mandamus* allowed by the trial court, that being the only adequate remedy available to the petitioning plaintiff, the question as to whether he was discharged without cause and in violation of the contract of employment was properly tried and determined in the court below, and its judgment enforcing the writ of mandate will be affirmed. (Id.)

See Negligence, 1-6.

EQUITY. See Accounting; Homestead; Injunction; Quieting Title; Specific Performance.

ESTABLISHMENT OF TITLE. See Title to Land.**ESTATES OF DECEASED PERSONS.**

1. **ACTION ON REJECTED CLAIM—ADMINISTRATRIX AS WITNESS FOR PLAINTIFF—MOTION TO STRIKE OUT PROPERLY DENIED.**—In an action on a rejected claim against the estate of a deceased person, where the administratrix of the estate was called as a witness for the plaintiff, was examined and cross-examined, without objection to her testimony as a whole, the defendant cannot be heard to complain, after the witness has left the stand, that her evidence was objectionable as a whole, and a motion then made to strike out all of her evidence, not based upon any valid objection previously stated, was properly denied. (*E. Martin & Company v. Brosnan*, 477.)
2. **CROSS-EXAMINATION OF PLAINTIFF'S WITNESS—QUESTION CALLING FOR INCOMPETENT HEARSAY—EXCLUSION BY COURT OF ITS OWN MOTION.**—While, ordinarily, it is the better and safer practice for the trial court to defer action upon the admission or rejection of evidence until a proper objection is made by the party interested in having the evidence excluded, yet, where the defendant, on cross-examination of a witness for the plaintiff, asked a question clearly calling for incompetent hearsay, the trial court is not compelled to hear and determine the cause, either in whole or in part, upon improper evidence, and, in the exercise of its undoubted right to control the conduct of the trial, it may of its own motion rightfully refuse to receive such clearly incompetent evidence. (*Id.*)
3. **ADMISSION OF CLAIM AS EVIDENCE—SHOWING AGAINST BAR OF STATUTE NOT REQUIRED—WAIVER OF FORMAL DEFECTS.**—The claim sued upon against the estate was properly admitted in evidence over the objection of the defendant. It was not necessary that such claim should show on its face that it is not barred by the statute of limitations; and in so far as the objection was directed to the formal sufficiency of the claim, its general rejection in the first instance, without special reason assigned, must be deemed a waiver of any formal defects therein. (*Id.*)
4. **ADMISSION IN ANSWER OF PRESENTATION AND REJECTION OF CLAIM—PROOF IN SUPPORT OF ACTION.**—Where the answer affirmatively admitted the presentation and rejection of the claim, no evidence thereof is required, but it is sufficient for the plaintiff to show that the action thereon is founded upon the same claim which was presented to the defendant for allowance. (*Id.*)
5. **PROMISE OF ADMINISTRATRIX TO PAY DEBT OF DECEASED HUSBAND TO PLAINTIFF—CREDITS ON ACCOUNT—NOVATION NOT ESTABLISHED—INTENT.**—A promise by the administratrix of the estate of her deceased husband, to pay the indebtedness of her husband to the plaintiff, and the making of some payments to the plaintiff, which were

ESTATES OF DECEASED PERSONS (Continued).

credited on the indebtedness of the deceased husband to the plaintiff, does not establish a novation, or release the liability of the estate to pay the unpaid residue of the plaintiff's claim. The intent to release the original debtor from the whole of the claim is essential to a novation, and if that intent be lacking, novation cannot be justly claimed. (Id.)

6. **INADVERTENT REMARK OF COURT IN DENYING NONSUIT—ABSENCE OF "NOVATION"—QUESTION OF FACT—PROVINCE OF JURY—CORRECTION—PRESUMPTION.**—Where the court, in denying a motion of defendant to nonsuit the plaintiff, inadvertently referred to a certain feature of the case, "which would indicate that there was no novation," and upon defendant's objection that the "province of the jury was invaded," the court promptly withdrew the remark, and instructed the jury immediately not to consider any remarks made by the court in passing upon the motion for a nonsuit, it is to be presumed that the jury heeded the caution, and the remark cannot be assigned upon appeal as prejudicial error. (Id.)
7. **EVIDENCE FOR PLAINTIFF SUFFICIENT TO SUPPORT VERDICT—ABSENCE OF COUNTER-EVIDENCE—NONSUIT PROPERLY DENIED.**—It is held that the evidence for the plaintiff is amply sufficient to support the verdict, and that, as there was no counter-evidence for the defendant, a motion for a nonsuit of the plaintiff was properly denied. (Id.)
8. **ABSENCE OF PREJUDICIAL ERROR IN INSTRUCTIONS.**—It is held that there was no prejudicial error of the court in giving or refusing instructions requested; and that in so far as the requested instructions were correct, they were in substance incorporated into and made part of the charge of the court, which was all that the defendant was entitled to. (Id.)
9. **REMOVAL OF EXECUTOR FOR FRAUD UPON ESTATE—FALSE CLAIM ALLOWED FOR PRIVATE DEBT.**—An executor should be removed under the terms of section 1136 of the Code of Civil Procedure, "when he has committed or is about to commit a fraud upon the estate." The act of the executor in allowing a false claim against the estate, with full knowledge of how the claim had originated, and that he had himself created the same as a claim against the estate, for the purpose of reimbursing his sister in law for moneys which he himself had borrowed from her, constituted a fraud against the estate for which he was properly removed. (Estate of Newell, 258.)
10. **FRAUDULENT USE OF POWER OF ATTORNEY—EXECUTION BY EXECUTOR TO HIMSELF—TRANSFER TO PRIVATE DEBTOR—APPROVAL OF CLAIM.**—Where the executor fraudulently used a power of attorney given to him by decedent while he was lying ill and near death, which contains no power to execute a note, to execute his note to himself, and then transferred the same to his sister in law, so as to include a large amount of interest added to his debt to her, and then

ESTATES OF DECEASED PERSONS (Continued).

approved the same as a claim against the estate, the case is clearly one of fraud upon the estate. (Id.)

11. **REVIEW UPON APPEAL—DISCRETION OF COURT IN REMOVING EXECUTOR.**—The superior court, as a court of probate, has the supervision of the estates of deceased persons, and is vested with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate; and that power is not to be interfered with by the appellate court, if it does not appear that its discretion has been abused; and where its findings and the evidence supporting the same appear to justify its action, this court will not review the same upon appeal. (Id.)
12. **CLAIM AGAINST ESTATE—FINAL DECREE SETTLING ACCOUNT AND ORDERING PAYMENT—TIME OF PRESENTATION—COLLATERAL ATTACK BY SURETY ON BOND.**—A decree settling the final account of an administratrix and directing the payment of a settled claim against the estate, the time for appeal from which has elapsed, is conclusively binding upon the surety of the administratrix, in case of her final noncompliance therewith, and the surety cannot collaterally attack the decree by showing that the claim was forever barred by reason of the fact that it had not been presented within the time limited by law and by the notice to creditors. (*L. Harter Company v. Geisel*, 282.)
13. **GENERAL JURISDICTION OF SUPERIOR COURT IN PROBATE—OBJECTION TOO LATE.**—The jurisdiction of the superior court, when sitting in a probate proceeding, is that of a court of general jurisdiction; and its order for the payment of the debts of a decedent's estate, as the circumstances may require, is within its jurisdiction, and is part of the settlement of the account; and an objection made after the decree ordering a claim to be paid has become final that it was not presented to the administratrix as required by law comes too late. (Id.)
14. **FAILURE TO PRESENT CLAIM IN TIME NOT JURISDICTIONAL ON FINAL SETTLEMENT—MATTER OF ERROR—ABSENCE OF FRAUD—CONCLUSIVENESS.**—The failure to present a claim in time does not go to the jurisdiction of the court to direct its payment upon final settlement of the account. It is only matter of error to be corrected on appeal, and it cannot be otherwise objected to, in the absence of fraud or collusion, which has not been here alleged or claimed. If not legitimately assailed, the order settling the final account and directing payment of the claim is conclusive upon all persons interested in the estate, whether heirs, legatees, or creditors. (Id.)
15. **FINAL OFFICIAL DUTY OF ADMINISTRATRIX TO COMPLY WITH ORDER—BREACH—CONCLUSIVENESS UPON SURETY.**—Where the decree of final settlement of the claim and directing its payment has become final and conclusive as to all parties interested in the estate, it then

ESTATES OF DECEASED PERSONS (Continued).

becomes the final official duty of the administratrix to comply with the order directing her to pay the same, and the breach of such official duty is a breach of official trust which is not only conclusive upon the administratrix, but also, in the absence of fraud or collusion, is conclusive against the surety upon her official bond, who, by the terms of the bond is liable therefor. (Id.)

See Accounting, 8; Specific Performance, 8, 4.

ESTOPPEL.

1. **FORMER JUDGMENTS INVOLVING VALIDITY OF TRUST—ACTION TO PARTITION TRUST FUNDS—INVALIDITY INVOLVED.**—Judgments in former actions, in one of which successors of a deceased trustee of an express trust were appointed, in a second of which the successor of a resigning trustee was designated, and in a third of which it was sought to obtain an accounting of trust funds and a partial distribution according to the terms of the trust, and in each of which the validity of the trust was necessarily involved and passed upon, are conclusive as an estoppel in a subsequent action to partition the entire funds between the claimants thereof on the ground of the invalidity of the trust. (*Silverston v. Mercantile Trust Company of San Francisco*, 180.)
2. **CODE RULE AS TO ESTOPPEL OF FORMER JUDGMENT.**—The elementary rule as to the estoppel of a former judgment is stated in section 1911 of the Code of Civil Procedure: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto." (Id.)
3. **PLEA OF FORMER JUDGMENTS IN ANSWER IN PARTITION—EFFECT OF STIPULATION—VALIDITY EXPRESSLY ADJUDICATED.**—Where the judgment-rolls in each of the former actions were set forth in the answer to the complaint in partition, and it was stipulated between the parties that the judgment-rolls therein pleaded were properly set forth, it must be accepted as true as alleged in the answer that the existence and validity of the trust was put in issue and adjudicated in each of said actions. (Id.)
4. **RECORD UPON APPEAL—CONTEST OF FORMER ACTIONS—PRESUMPTIONS—GROUND OF CONTEST—FINDING—PERFORMANCE OF COURT'S DUTY.** Where the record upon appeal shows that each of the former actions was contested by appellant, it must be presumed, in the absence of any counter-showing, that they were contested on the ground of invalidity of the trust, and that the court expressly found in favor of its validity. It must be presumed that the court in the conduct of each of the actions performed its manifest duty to determine the

ESTOPPEL (Continued).

validity of the trust which it sought to enforce, and to avoid any illegal or abortive act in enforcing a void trust. (Id.)

See Corporation, 11; Homestead, 6; Incompetent Persons, 4, 6; Insurance, 3, 4; Specific Performance, 17, 25.

EVIDENCE. See Account, 2-3; Attorney at Law, 2, 8; Brokers, 8, 9; Criminal Law, 16, 18, 25-47, 65-67, 73, 75-90, 93-100, 102-106, 109, 111; Estates of Deceased Persons, 1-3, 7; Fraud, 10-12; Guaranty, 5, 6; Incompetent Persons, 8, 9; Lease, 4; Mechanics' Liens, 4, 12-15; Negligence, 5, 6, 12, 18, 80; Parent and Child, 3-6; Sale, 11, 12; Specific Performance, 6-10; Undue Influence, 1-9.

EXECUTION. See Assignment, 1, 2.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

EXTREME CRUELTY. See Divorce, 7-10.

FINDINGS.

1. **DUTY OF COURT—MATERIAL ISSUES—ULTIMATE FACT—PROBATIVE FACTS.**—It is the duty of the trial court to find upon all of the material issues raised by the pleadings; and ordinarily it is necessary to the validity and sufficiency of findings that such court should find the ultimate fact in issue, or such probative facts as will enable the court to declare that the ultimate fact necessarily results therefrom. Where probative facts are found from which the existence of the ultimate fact may be conclusively inferred, the finding is sufficient, and a judgment based thereon will be sustained. (*Jessen v. Peterson, Nelson & Co.*, 349.)
2. **ACTION FOR DAMAGES FOR PERSONAL INJURIES—FINDINGS UPON MATERIAL ISSUES—ULTIMATE FINDING IN CONCLUSIONS OF LAW.**—Where, in an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the defendant, the court found for the plaintiff upon all of the material issues, and made an ultimate finding as to the total amount of damages sustained, in its conclusions of law, and rendered judgment therefor, the trial court's declaration that the plaintiff was entitled to a judgment therefor as the result of the damage inflicted by defendant was in effect a finding of the ultimate fact that plaintiff had been damaged to that amount. (Id.)
3. **CONSTRUCTION OF FINDINGS—POSITION IMMATERIAL—SUPPORT OF JUDGMENT.**—The mere presence of the ultimate finding as to the amount of damages in the conclusions of law, rather than in the

FINDINGS (Continued).

findings of fact, where it belonged, did not detract from or destroy its efficacy as a finding of fact; and so construed and read in conjunction with the preceding probative facts found by the court, it is sufficient to support the judgment upon the issue of damages. (Id.)

4. **FINDINGS UPON CONFLICTING EVIDENCE NOT REVIEWABLE.**—Where the questions of fact determined by the findings of the trial judge rest, in the main, upon evidence of a conflicting nature, the findings are not subject to review upon appeal. (*Carpenter v. Grogan*, 505.)
5. **SUFFICIENT COMPLAINT—GENERAL FINDING—SUPPORT OF JUDGMENT.** Where the complaint states a cause of action, a general finding that all of the allegations of the complaint are true, and that all of the allegations of the answer and cross-complaint of the defendant are untrue, sufficiently supports the judgment for the plaintiff. (*Wagy v. Atkinson*, 178.)

See Appeal, 9, 12-15; Divorce, 9, 10; Judgment, 13, 14; Landlord and Tenant, 3, 4; Mortgage, 10, 11; Negligence, 4; Taxation, 1, 2.

FIREMAN'S RELIEF FUND. See Office and Officers, 9-12.

FIXTURES. See Mortgage, 12-15.

FRAUD.

1. **ACTION FOR MONEY OBTAINED BY FRAUD—NEWSPAPER SUBSCRIPTION PRIZE CONTEST—FALSE STATEMENT AS TO CONDITION OF VOTES—GUARANTY—PUBLIC POLICY.**—An action against a publishing company engaged in a newspaper subscription prize contest, to recover the sum of \$300 paid to the defendant, on the ground that it was obtained by the fraud of its agents in charge of the contest, by falsely stating the condition of the votes upon the first prize, and that such payment would secure subscriptions sufficient to obtain the first prize over all contestants, and that it would be guaranteed, and that if the plaintiff did not obtain it the money would be refunded by the defendant, is tenable, and cannot be resisted on the ground that the contract was in fraud of the rights of other contestants, and against public policy. (*Goodhart v. Mission Publishing Co.*, 394.)
2. **GOOD FAITH OF PLAINTIFF—ABSENCE OF FRAUD UPON OTHER CONTESTANTS—RELIANCE UPON AGREEMENT TO REFUND.**—Where it appears that the plaintiff is a young girl who acted in entire good faith, and without any intention to do otherwise than to secure for herself sufficient votes by newspaper subscriptions to obtain the first prize in a manner which would be available to any other contestant, there is an entire absence of fraud upon her part upon the rights of other contestants. Nor could the agreement to refund the money,

FRAUD (Continued).

if the first prize were not obtained, be in fraud of the rights of other contestants, though it is an agreement upon which the plaintiff might well have relied. (Id.)

3. **GENERAL VERDICT FOR PLAINTIFF—SPECIAL FINDINGS BASED ON AGREEMENT WITH SUBSCRIPTION AGENT—IMPROPER JUDGMENT ON SPECIAL FINDINGS.**—Where the jury rendered a general verdict for plaintiff for the sum of \$300 sued for, and also rendered a special verdict in affirmative response to special interrogatories as to all of the specific terms agreed to between the plaintiff and the agent of the defendant in charge of the subscription prize contest, and that plaintiff delivered the money in reliance upon that agreement, it is held that there is no inconsistency between the general and special verdicts, and that the court erred in granting defendant's motion for judgment on the special verdict. (Id.)
4. **IMMATERIAL CONDITIONAL ELEMENT IN CONTRACT WITH AGENT.**—The further element which appears to have entered into the agreement with the agent that in the event that plaintiff had not enough votes to secure her the first prize, defendant, "if necessary for that purpose, would deliver enough votes to insure her the first prize," may be rejected from consideration, since, as determined by the special findings, the damage accrued to plaintiff by reason of the false representations as to the condition of the vote at the time she paid the \$300 to the defendant. (Id.)
5. **CLAIM OF DEFENDANT AS TO UNAUTHORIZED ACT OF AGENT—CONCLUSIVENESS—APPEAL OF PLAINTIFF.**—The averment of defendant that the agents who received from the plaintiff the \$300 were not acting within the limits of their authority when they made the representations to the plaintiff, as charged, presents a question which it is held was settled adversely to the defendant by the verdict of the jury, and is not open to review in its favor on appeal of plaintiff from the judgment rendered for defendant on the special findings. (Id.)
6. **CLAIM OF UNLAWFUL CONTRACT—ESSENTIALS TO DENIAL OF RELIEF—CLAIM NOT SUSTAINED.**—Before relief can be denied because of the unlawful nature of a contract, whereby some rule of public policy is claimed to have been violated, it must appear clearly that the case comes within that class, and that the agreement of the parties in its essential obligations is tainted from improper motives. It is held that the case, as it is exhibited by this record, is not one of that kind. (Id.)
7. **ACTION UPON NOTES—CONSIDERATION—DEED OF GRAVEL LAND—ASSIGNMENT OF OTHER ASSIGNED RIGHTS—ABSENCE OF FRAUD.**—In an action upon two notes, the consideration of which was, *in solido*, a deed of gravel land from the payee and an assignment of such other

FRAUD (Continued).

rights as the payee had taken only by assignment from other contracting parties, it is held that there was no deceit or fraudulent representation as to the duration of one of such assigned rights, and where it appears that the maker was permitted to work gravel thereon for one year, it cannot be maintained that there was any failure of consideration for the notes, in whole or in part. (*Knobloch v. Bader*, 421.)

8. **SALE OF LAUNDRY BUSINESS WITH PERSONAL PROPERTY—FALSE REPRESENTATIONS AS TO EXTENT OF BUSINESS—DEDUCTION OF DAMAGES FROM PRICE—RESCISSION IMPRACTICABLE.**—Upon the sale of a laundry business, with the goodwill thereof, with horses, wagons, harness and storm robes, where \$100 had been paid upon the price, and a balance of \$500 was claimed thereupon, and defendant alleged that the contract was obtained by false representations, and claimed a rescission, and the court found that defendant was damaged to the extent of \$100 by the false representations, that the business had been delivered to defendant, and cannot be fully restored, that one of the horses had been sold, and no return of receipts was offered, it is held that the court did justice between the parties by deducting the \$100 from the balance due, and rendering judgment for plaintiff for the residue. (*Kasch v. Labor Temple Assn.*, 508.)
9. **RESTORATION OF STATUS ESSENTIAL TO RESCISSION OF CONTRACT.**—The full restoration of the *status* of the other party is essential to the right of rescission of a contract therewith on the ground of alleged fraud; and where, upon the sale of a business, it becomes impossible, as the result of the execution of the contract, to place the parties *in statu quo*, there can be no rescission of the contract. (*Id.*)
10. **ACTION TO RESCIND CONTRACT TO EXCHANGE LAND—FRAUDULENT REPRESENTATIONS—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE—CONCLUSIVENESS UPON APPEAL.**—In an action to rescind a contract to exchange land on the ground of the fraudulent representations of the defendants as to the value of their property exchanged for that of the plaintiff, where the findings and judgment were for the plaintiff and against the defendant appealing, and there is some evidence in favor of the plaintiff, and the evidence is conflicting, the decision of the trial judge thereon is conclusive upon appeal. (*Mattern v. Alderson*, 590.)
11. **INCOMPETENT EVIDENCE AS TO MARKET VALUE OF PROPERTY INVOLVED IN EXCHANGE.**—A question as to what the plaintiff paid for her property was properly excluded as incompetent to prove its market value, and the court properly excluded nonexpert evidence as to the value of plaintiff's property, and also properly excluded advertisements in newspapers and public reports tending to show an exciting condition of the real estate market as affecting the

FRAUD (Continued).

defendant's property offered in exchange, as not being competent evidence as to its value, and also properly disallowed proof by the defendant as to the value of any property not involved in the exchange. (Id.)

12. **NEWLY DISCOVERED EVIDENCE—INSUFFICIENT EXCUSE FOR NONPRODUCTION.**—If it be conceded that newly discovered evidence offered as a ground for a new trial is material, yet where no sufficient showing appears why such evidence was not produced at the trial, it being additional evidence of a witness who testified at the trial, it cannot be held that the court erred in denying the motion. (Id.)

13. **PROPER RELIEF AS TO BILL OF EXCEPTIONS—REVERSIBLE ERROR NOT SHOWN.**—It is held that the court properly allowed a bill of exceptions to be settled for use on the motion for a new trial, after the time limited, upon the showing of a sufficient excuse under section 473 of the Code of Civil Procedure, though upon a careful scrutiny thereof it discloses no reversible error. (Id.)

See Criminal Law, 15-18; Divorce, 1-6; Estates of Deceased Persons, 9-11; Homestead, 6; Undue Influence; Vendor and Vendee, 2.

GIFT. See Accounting, 1; Homestead; Husband and Wife; Quisting Title.

GOODWILL. See Restraint of Trade.

GRANTOR AND GRANTEE. See Deed.

GUARANTY.

1. **ACTION UPON GUARANTY OF INDEBTEDNESS — TERMS OF PAYMENT—PLEADING—PROOF—IMMATERIAL VARIANCE—GUARANTOR NOT MISLED.** Where the complaint, in an action against the individual defendant upon his contract of guaranty of the indebtedness of the corporation defendant to plaintiff's assignor, alleges that by the terms of the written guaranty it was agreed to pay the indebtedness with interest in installments at the rate of \$75 per month, but the proof was that the writing merely guaranteed the principal sum with interest, and shows a variance as to the installments, it is held that where such variance could not have misled the guarantor to his prejudice in maintaining his defense that he had signed no guaranty at all of the debt in question, the variance was immaterial. (Union Collection Co. v. Rogers, 205.)
2. **TERMS OF PAYMENT IMMATERIAL—LAPSE OF INSTALLMENTS BEFORE SUIT—ABSENCE OF OBJECTION TO EVIDENCE—AVOIDANCE OF OBJECTION.**—Whether or not the balance of the indebtedness was payable

GUARANTY (Continued).

at once or in installments is of little or no importance, since in either case the whole of the indebtedness was long overdue before the action was commenced, and there was no objection to the evidence or motion for nonsuit on the ground of variance or any ground; and if such objection had been made, it might have been obviated by an amendment to conform the pleading to the proof. (Id.)

3. **ALLEGATION AND FINDING AS TO INSTALLMENTS DISREGARDED.**—In view of the time of the commencement of the action, the allegation and finding to the effect that the balance of the indebtedness was to be paid at the rate of \$75 per month may be disregarded, where there is left the allegation and finding that the principal obligor in writing promised to pay the balance of the indebtedness with the specified interest, and that the appellant in writing guaranteed the payment of the same, the whole balance being due and unpaid when the action was brought. (Id.)
4. **NEW TRIAL NOT GRANTABLE FOR VARIANCE NOT OBJECTED TO.**—It is held that a new trial should not be ordered on the ground of the variance complained of, especially as the point was not raised in the court below either upon objection to evidence or upon motion for a nonsuit. (Id.)
5. **SUPPORT OF FINDING AS TO WRITTEN GUARANTY OF DEBT—CONFLICTING EVIDENCE—PREPONDERANCE.**—Where there is a substantial conflict in the evidence as to whether the appellant guaranteed in writing the payment of the principal debt, the appellate court cannot disturb the finding of the trial court on the ground that the trial court has not decided in accordance with preponderance of the evidence. (Id.)
6. **CROSS-EXAMINATION AS TO EXECUTION OF GUARANTY—STRIKING OUT ANSWER NOT PREJUDICIAL.**—It is held that the court did not err to the prejudice of the appellant in striking out his answer on cross-examination denying the execution of the contract of guaranty, where in other answers to other questions the appellant had fully and clearly covered the same matter. (Id.)
7. **GUARANTY OF RENT RESERVED IN LEASE—ASSIGNMENT BY LESSOR—ACTION BY ASSIGNEE.**—An assignee of a lease from the lessor and of a written contract of guaranty to secure the payment of the rent reserved, which was executed contemporaneously with the lease and was made part thereof, which guaranty was neither expressly nor impliedly limited to the lessor personally, may sue both the lessee and the guarantor in his own name as assignee to collect the rent and to enforce the same against the guarantor. (Reios v. Mardis, 276.)
8. **MODIFICATION OF COMMON-LAW RULE FORBIDDING SUIT BY ASSIGNEE OF CHOSE IN ACTION.**—The common-law rule that a chose

GUARANTY (Continued).

in action cannot be transferred by assignment, so as to enable the assignee to sue thereon in his own name, has been materially modified, if not entirely superseded, by the code provisions of this state, which authorize a non-negotiable chose in action to be transferred with all the rights of the assignor, subject to equities and defenses against the assignor, and require every action to be prosecuted in the name of the real party in interest. (Id.)

9. **EFFECT OF CODE PROVISIONS — ACTION BY ASSIGNEE OF CONTRACT OF GUARANTY.**—The immediate effect of the code provisions of this state is to permit the assignee of a contract of guaranty of rent, which is but a chose in action, to sue thereon in his own name, and where there is no personal limitation of the guaranty, it may, like any other promise made to the lessor, be assigned and sued upon by the assignee. (Id.)
10. **ASSIGNMENT OF LEASE WITH CONSENT OF GUARANTOR — PERSONAL LIMITATION IMMATERIAL.**—Where it appears that the assignment of the lease and of the contract of guaranty was made with the consent of the guarantor, the contention that the assignment of the lease was personal to the lessor must fail in the presence of that fact. (Id.)
11. **GUARANTY PART OF LEASE ASSIGNED AS SINGLE CONTRACT — ASSIGNMENT OF LEASE CARRYING GUARANTY — REMEDIES OF ASSIGNOR.** Where it further appears that the guaranty was so executed as to become part of the lease itself, the lease and guaranty must be construed to be a single contract, upon which the liability of the guarantor, to the extent of his obligation, was commensurate with that of the lessee; and the assignment of the lease by the lessor carried with it the same remedies for the recovery of rent and for nonperformance of the lease as the assignor might have had in the first instance. (Id.)
12. **PLEADING — COMPLAINT BY ASSIGNEE OF LEASE AND GUARANTY — AVERTMENT OF ASSIGNMENT — PRESUMPTION OF WRITING — RULINGS UPON DEMURRER.**—Conceding that a general order sustaining a demurrer will be upheld, if tenable on any ground assigned, and that leave to amend may be granted or withheld in the discretion of the court, yet where it appears that a special demurrer to the complaint by the assignee of the lease and guaranty is untenable, a general demurrer thereto cannot be sustained if the complaint states a cause of action, even though some of the facts relied on to support it are defectively pleaded. When, therefore, such complaint is otherwise sufficient, and states the assignment of the lease and guaranty as a fact, it will be presumed in support of its sufficiency that the assignment was in writing. (Id.)

HABEAS CORPUS. See Contempt, 3; Criminal Law, 2, 53, 60; Municipal Corporations, 1.

HOMESTEAD.

1. **ACTION BY GRANTEE OF HUSBAND TO QUIET TITLE TO LOT ON HOMESTEAD—PAROL GIFT—IMPROVEMENTS—EQUITABLE DEFENSE AND CROSS-COMPLAINT—RELIEF.**—An action by a grantee of the surviving husband to quiet title to a town lot, forming part of homestead property, which appears to have been given by parol gift of both husband and wife to their son, who had previously rendered services for their benefit, which lot was, at that time, of the value of only \$75, under an agreement that he was to fence and improve the same, which he did to the extent of \$1,500, is not tenable in equity; but the son may plead such equitable facts by way of answer and cross-complaint, and the court may quiet his title thereto, and adjudge a conveyance of the legal title, either by the plaintiff, or otherwise, by a commissioner's deed. (*Kinsell v. Thomas*, 683.)
2. **RIGHTS OF SPOUSES IN HOMESTEAD—JOINT, LEGAL OR EQUITABLE ACTION ESSENTIAL—SUPPORT OF FINDINGS AND JUDGMENT ENFORCING EQUITY—CONFLICT.**—Neither of the spouses can, in law, grant any rights in the homestead property without the consent of the other; and neither of them can create an equity therein by parol gift, without the consent of the other. Yet, where it appears that an executed parol gift of a lot thereon was made by the joint act of both husband and wife to their son, for a consideration previously received from him, and also his fencing and improving the same for a home, which he did at great expense to himself, equity will protect such executed parol gift; and findings and a judgment enforcing them will not be disturbed, notwithstanding a conflict of evidence, where there is sufficient evidence to support the findings. (*Id.*)
3. **NOTICE OF DEFENDANT'S EQUITY TO PLAINTIFF—WANT OF PURCHASE IN GOOD FAITH—CONSIDERATION OF DEED—PRESUMPTIONS.**—Where the defendants, husband and wife, were in undisputed possession of the lot in controversy when the plaintiff obtained a deed thereof from the father, such possession of an improved and fenced lot was sufficient to put the grantee upon inquiry as to their rights in the premises, and to charge him with notice thereof. And where there is no evidence to rebut the presumption that the recital of \$10 in the deed was the sum actually paid by the plaintiff to the father for the son's lot and improvements, it must be presumed that that was all that he paid therefor; and it must also be presumed that he took such conveyance with full notice of the legal and equitable rights of the son, and in subordination thereto. (*Id.*)
4. **EQUITABLE RIGHTS OF SON TO IMPROVEMENTS—CONDITION OF EQUITABLE RELIEF.**—Whatever may be said of the legal rights of the

HOMESTEAD (Continued).

son, and even if it should be supposed that one of the spouses failed to consent to the gift, yet inquiry would have shown either that he possessed a valid title thereto, or that he was made to believe, and therefore honestly believed, that he owned such title, and under such belief made expensive improvements, which, under the circumstances, vested in him an equity in the premises, of which he could not wantonly be divested or deprived without reimbursement or compensation, as a condition precedent to the right of the plaintiff to the equitable relief sought by him. He cannot have equitable relief without doing equity. (Id.)

5. **PAROL GIFT OF HOMESTEAD — ENFORCEMENT IN EQUITY.**—A parol gift of real property by the husband and wife, for whose benefit a homestead has been declared on the property, and is in existence at the time of such gift, may and will be enforced by a court of equity when the circumstances of such gift are similar to those under which a like gift of real property not impressed with a homestead will be enforced. (Id.)

6. **GROUND OF EQUITABLE RELIEF — STATUTE OF FRAUDS — ESTOPPEL FROM STANDING ON LEGAL RIGHTS — PREVENTION OF FRAUD.**—Equity does not grant relief respecting parol gifts of land on the ground that the agreement for a writing under the statute of frauds should be dispensed with. It regards the writing as of binding force in law, but acting *in personam*, and operating upon the consciences of the parties to such agreements, equity merely says that a party to such parol gift will be estopped from standing on his legal rights in support of his refusal to carry out the parol agreement, where the circumstances disclose that such conduct on his part would be unconscientious and work a fraud upon the rights of the other party. (Id.)

HUSBAND AND WIFE.

1. **PURCHASE BY HUSBAND OF LAND IN WIFE'S NAME — PRESUMPTION OF GIFT — CODE PRESUMPTION OF SEPARATE PROPERTY — BURDEN OF PROOF.**—Where land in this state is purchased by the husband in the name of the wife, either with his separate funds or with community funds, the presumption arises that a gift of such land to the wife was intended; and under section 164 of the Civil Code, the presumption is that the title is thereby vested in the wife as her separate property. The burden to overcome such presumption rests upon anyone interested in attacking the wife's title to produce competent evidence of sufficient weight to show that the husband did not intend such property as a gift to his wife. (Carle v. Heller, 577.)

2. **ABSENCE OF EVIDENCE OVERCOMING TITLE OF WIFE — SALES AND DISPOSITION OF WIFE'S ESTATE PRESUMED SEPARATE.**—In the absence of evidence sufficient to overcome the title of the wife in the

HUSBAND AND WIFE (Continued).

property originally acquired by her from her husband's funds, as her presumed separate estate, and in the absence of any further showing of the loss of such title, the presumption is that the proceeds of the sale of his original separate estate continued as her separate estate. (Id.)

3. **PROCEEDS OF SALES OF SEPARATE PROPERTIES OF HUSBAND AND OF WIFE—ALTERNATIVE MODE OF DEPOSIT IN BANK—GIFT BY WIFE NOT PRESUMED.**—Where a contemporaneous sale was made of the wife's separate property, and of a lot belonging to the husband, and the proceeds of the sale of each was known, the mere fact that all of the proceeds were deposited alternatively in the names of the husband "or" wife did not of itself constitute evidence tending to disprove the presumption that the husband gave to the wife the property from the sale of which her part of such proceeds was derived; neither does such fact, standing alone, show that the wife intended to give to the husband any part of her interest in the land. (Id.)

4. **MORTGAGE BY HUSBAND AND WIFE ON HER SEPARATE ESTATE—PRESUMED WANT OF HUSBAND'S INTEREST—PAYMENT OUT OF WIFE'S ESTATE.**—Money borrowed on the faith of the wife's separate estate is her separate estate in the absence of a showing to the contrary. The mere fact that the husband joined with the wife in a mortgage loan on her separate estate, at a time when he owned no property, does not indicate that he owned any interest in the mortgage on the property, especially where it appears that such mortgage loan was paid mostly out of the rents and profits of the wife's separate estate, which were her separate property, and that the small residue was paid out of the proceeds of the sale of her separate estate. (Id.)

5. **COMMINGLING OF FUNDS—SEPARATE INTERESTS CLEARLY ASCERTAINABLE—PARTIAL TRANSMUTATION SHOWN.**—The mere commingling of the funds on deposit belonging to the husband and wife does not render the interest of each party not clearly ascertainable. Where it appears that by investment a part of the proceeds of the wife's separate estate became vested in the husband, and the residue remained in the wife, she is entitled to the whole residue remaining in her as her separate estate, and no part thereof can be claimed by the heirs of the deceased husband. (Id.)

See Account; Community Property; Divorce; Prohibition, §.

INCOMPETENT PERSONS.

1. **ACTION ON NOTE BY ASSIGNEE—COMPETENCY OF ASSIGNOR—COMPROMISE OF INDEBTEDNESS—UNTENABLE DEFENSE OF PAYEE'S INSANITY.** In an action on a note assigned by the payee to the plaintiff after being adjudged mentally competent, a defense that when the note

INCOMPETENT PERSONS (Continued).

was given by a competent maker, in compromise of his indebtedness to the payee, who had not then been adjudged incompetent, that the payee was so far mentally deranged prior to and at the time of the compromise as to be incapable of entering into a contract of any kind, cannot be sustained nor properly pleaded and proven as a legal defense to the note. (*San Francisco Credit Clearing-House v. MacDonald*, 212.)

2. **CONSTRUCTION OF CODE—BENEFIT OF "PERSON WITHOUT UNDERSTANDING"—PROVISION NOT AVAILABLE BY PERSON OF SOUND MIND.** The provision in section 38 of the Civil Code that "A person entirely without understanding has no power to make a contract of any kind," was enacted for the benefit and protection of persons who are entirely devoid of capacity to comprehend the nature and subject of a contract, and it cannot be invoked by a person of sound mind in an attempted avoidance of a contract which he may have made with a person subsequently ascertained to be of unsound mind. (*Id.*)
3. **POWER OF RESCISSION UNDER CODE LIMITED TO RESCINDING PARTY.** The provision in section 39 of the Civil Code, that "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission," was also enacted for the benefit and protection of incompetent persons, and until that right is exercised, the contract is binding upon the party of sound mind. (*Id.*)
4. **BENEFICIAL CONTRACT IN FAVOR OF PERSON OF UNSOUND MIND — LEGAL PRESUMPTION—ESTOPPEL.**—Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes in his favor the existence of the requisite capacity, or for his protection estops the other party to set up and sustain the objection as against the legal representative of the payee, that the payee was *non compos mentis* when the contract was made. (*Id.*)
5. **COMPROMISE WITH ATTORNEY IN FACT OF PAYEE—REVOCATION UPON INSANITY—QUALIFICATION OF RULE—RATIFICATION UPON RESTORATION.**—Though it may be conceded that if the compromise of the indebtedness which resulted in the note was made with the payee's attorney in fact under a general power of attorney while the payee was entirely without understanding, the powers of the attorney in fact were terminated by operation of law as to persons having notice of the principal's disability, yet this general rule of law is subject to the qualification that if, upon his restoration to reason, the principal ratifies, or fails after knowledge to repudiate, the acts of his agent, the powers previously granted will be considered merely as suspended, and the acts done by the agent will be deemed assented to by the principal. (*Id.*)
6. **RATIFICATION OF COMPROMISE—ASSIGNMENT OF NOTE FOR COLLECTION—ESTOPPEL AS TO INDEBTEDNESS.**—Where the payee alleged

INCOMPETENT PERSONS (Continued).

to be insane, upon being restored to reason, assigned the note to the plaintiff for collection, this was an acceptance of the note and a ratification of the compromise from which the note emanates; and upon the principle that "He who can and does not forbid an act which is done in his behalf is deemed to have bidden it," the payee would by the judgment in the action be forever estopped from claiming or suing upon the original indebtedness. (Id.)

7. **MENTAL CONDITION OF PAYEE AT TIME OF EXECUTING NOTE—SUPPORT OF FINDING.**—It is held that the evidence upon the whole case sufficiently supports the finding of the court that at the time of the execution of said promissory note, the payee had sufficient mental capacity to understand the nature and purpose of said transaction; that a person, though insane in a general sense, may not be deprived of the power of knowing and understanding the nature of ordinary business transactions, and in such case the form of mental unsoundness will not render a person legally incapable of entering into a valid contract. (Id.)
8. **TESTIMONY OF PHYSICIAN IN CHARGE OF PAYEE AS INSANE.**—The testimony of the physician who had charge of the payee as an insane person was properly admitted in his behalf, and in behalf of his assignee for collection, as his agent, that he was not, while in his care, so far mentally deranged as to be entirely incapable of knowing the nature and purpose of the transaction in question; and that he was discharged as completely cured mentally, after having been in his care about one year and a half. (Id.)
9. **CONSTRUCTION OF CODE AS TO DISQUALIFICATION OF PHYSICIAN—BENEFIT OF PATIENT—WAIVER.**—The general rule of law found in subdivision 4 of section 1881 of the Code of Civil Procedure, which in effect declares that a physician may not give in evidence any information concerning the ailment of his patient which was acquired in the performance of his professional duties, was created for the protection of the patient, and operates upon the physician alone, and confers a personal privilege on the patient, which may be expressly or impliedly waived by him in person, or by an agent or attorney acting on his behalf. (Id.)
10. **ALLOWANCE OF INTEREST UPON NOTE—AMBIGUOUS PROVISION.**—Where the note sued upon is ambiguous as to the mode in which interest should be allowed thereon, the trial court properly adopted that construction which was favorable to the party in whose favor the note was made. (Id.)

INEBRIETY. See Criminal Law, 53-56.

INJUNCTION. See Accounting, 5-9; Corporation, 2.

INSANE PERSONS. See Incompetent Persons; Office and Officers, 10-12.

INSOLVENCY. See Bank, 10; Corporation, 1-3.

INSTRUCTIONS. See Criminal Law, 21, 50, 68-71, 92, 100, 101, 106, 107, 111; Estates of Deceased Persons, 8; Negligence, 12, 14, 15; Sale, 13.

INSURANCE.

1. **ACCIDENT INSURANCE—LIMITATION IN POLICY AS TO TIME OF BEGINNING ACTION—INSUFFICIENT COMPLAINT—JUDGMENT ON DEMURRER—APPEAL.**—In an action by a wife upon a policy of accident insurance in favor of her husband, who died as the result of accidental injuries sustained by him, in which it appears that the policy limited the time for the commencement of the action to a period of twelve months from the date of the accident, and that the action was commenced nearly thirteen months after that date, the ruling of the trial court in rendering judgment for defendant upon demurrer to the complaint, on the ground that the action was barred, must be upheld upon appeal. (*Fitzpatrick v. North American Accident Ins. Co.*, 264.)
2. **GENERAL RULE AS TO LIMITATION OF ACTIONS IN INSURANCE POLICIES.** It is a settled rule that clauses in policies of insurance, limiting the time in which actions may be commenced thereon to a time shorter than that prescribed by the statute of limitations, are valid if the time limited is not in itself unreasonable. (*Id.*)
3. **RULE AS TO ESTOPPEL IN CASE OF BAD FAITH.**—If the company defendant had been guilty of bad faith, or such conduct as rendered it impossible to comply with the provisions of the policy, before the time limited for bringing the suit had expired, it would be estopped from relying thereon. (*Id.*)
4. **ABSENCE OF ESTOPPEL—EXACTION OF PROOFS OF LOSS—TIME FOR ACTION.**—There is no element of estoppel of the accident insurance company, defendant, available to the plaintiff by its merely exacting a strict compliance with the proofs of death, which were made within the time limited in the policy therefor, when there still remained ample time within which the plaintiff could bring his action. (*Id.*)
5. **LIFE INSURANCE—ACTION ON POLICY BY BENEFICIARY—STATEMENTS IN APPLICATION—ABSENCE OF "ILLNESS" SINCE CHILDHOOD—PHYSICIAN NOT "CONSULTED."**—An action upon a policy by a husband as the beneficiary of his wife, whose statements made in her application for the policy were that she had "not been confined to the house by illness since childhood," or "consulted a physician since that time," is not defeated by mere evidence of a physician that two years before the application he had treated her, when con-

INSURANCE (Continued).

fined temporarily "from a cold, with a temporary difficulty during menstruation," that he gave her a little medicine, and that she got better "right away," and that afterward "he gave her a general tonic to build her up and give her an appetite." (*Pool v. Grand Circle Women of Woodcraft*, 457.)

6. **DEFINITION OF "ILLNESS" AS USED IN POLICY.**—The word "illness," as used in the policy, must be construed to mean something more than a mere indisposition due to a temporary cold, accompanied by a painful menstrual period. That word, as used, means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system. "Illness" relates to matters which have a sensible, appreciable form, and applies ordinarily to matters of a substantial character, and not to a slight and temporary indisposition, speedily forgotten. (*Id.*)
7. **"CONFINEMENT TO HOUSE BY ILLNESS"—DISREGARD OF "TRIFLES."** Remaining in the house for a few hours as the result of a cold, or other temporary indisposition, cannot be construed as "confinement to the house by illness." Applying the maxim embodied in section 3533 of the Civil Code, that "The law disregards trifles," the evidence wholly fails to show that the statement made by the applicant to the effect that she had not been confined to the house by illness was untrue. (*Id.*)
8. **QUESTION AS TO "CONSULTATION OF PHYSICIAN"—CONSTRUCTION.**—A reasonable construction of the question as to whether the insured had "consulted a physician" implies that it should be interpreted as relating to a consultation as to some disease or illness with which the applicant was or had been afflicted, and not to some feeling of trivial discomfort or temporary indisposition not affecting the general health. (*Id.*)
9. **SUPPORT OF FINDING AGAINST BREACH OF WARRANTIES.**—Even if the statements made in the application for the policy be considered as warranties, it is sufficient to say that the finding of the court that there was no breach of said warranties is fully sustained by the evidence. (*Id.*)

INTEREST. See Incompetent Persons, 10; Specific Performances, 19-22.

INTERVENTION. See Appeal, 13-15.

INTOXICATING LIQUORS. See Criminal Law, 57-60; Election.

JUDGMENT.

1. **CLERK'S ENTRY OF DEFAULT JUDGMENT—MINISTERIAL DUTY—PRESUMPTION OF OTHER PROOF NOT INDULGED.**—Where a default judgment is entered by the clerk, there is no such presumption of other

JUDGMENT (Continued).

proof as would attend such a judgment ordered by the court. The clerk's duty in entering a judgment by default is ministerial, and not judicial in its nature. (*R. H. Herron Co. v. Westside Electric Co.*, 778.)

2. **VACATION OF DEFAULT JUDGMENT—GENERAL RULE AS TO REVIEW OF DISCRETION UPON APPEAL—ABUSE—BORDER LINE.**—Under the general rule that the granting or denial of a motion to set aside a judgment by default is largely a matter of discretion to be exercised by the trial court, and that the action in granting or refusing the application will only be reversed where there is a clear abuse of discretion, it is held that while the present appeal from an order refusing to vacate a judgment by default appears to be near the border line, yet this court is unable to say, in view of the entire record, that the trial court abused its discretion in denying appellants' motion. (*Kearney v. Palmer*, 517.)
3. **RELIANCE OF SUBSTITUTED ATTORNEY UPON FALSE STATEMENT OF CLIENTS.**—Where it appears that a substituted attorney relies upon the false statement of his clients appealing that the demurrer had not been disposed of, they should not be allowed to complain of the result of their own false statements; and where there are several statements in their joint affidavits which are shown to be untrue, the court was justified in distrusting all of their statements. (*Id.*)
4. **ACTION TO QUIET TITLE—INSUFFICIENT AFFIDAVIT OF DEFENSE—DEFENDANTS MERE SQUATTERS ON STATE LANDS.**—Where the complaint of the plaintiff showed a cause of action to quiet title to land owned by the plaintiff, and the affidavit of defense filed with the motion to vacate the judgment for the plaintiff by default merely denied plaintiff's title upon information and belief, and clearly shows that defendants are mere squatters on land belonging to the state, with no title or claim of title to the premises sued for, it is held that this court, for that reason, is more readily inclined to affirm the action of the trial court in refusing to vacate the judgment. (*Id.*)
5. **CLAIM OF APPELLANTS THAT ORIGINAL ATTORNEY MISLED THEM—CONFLICT OF EVIDENCE.**—Where there is a clear conflict of evidence as to the claim of the appellants that they were misled by their original attorneys as to whether the demurrer had been overruled, this court must assume that the trial court in denying the motion resolved all conflicts of evidence against the appellants. (*Id.*)
6. **ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT—DISCRETION NOT ABUSED—FALSE STATEMENT OF CLIENTS—INSUFFICIENT DEFENSE—CONFLICTING EVIDENCE.**—Judgment affirmed on the authority of *Kearney v. Palmer*, *ante*, p. 517. (*Kearney v. Pierson*, 521.)

JUDGMENT (Continued).

7. **JUDGMENT BY DEFAULT—RULE AS TO VACATION—DISCRETION—REVIEW UPON APPEAL—QUESTION OF ABUSE.**—The matter of setting aside defaults and vacating judgments entered thereon is very largely a matter of discretion to be liberally exercised by the trial court in furtherance of justice, and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will only do so when it appears that there has been a plain abuse of discretion. Nevertheless, where the appellate court is obliged to say that the action of the trial court involves an abuse of discretion, it is the duty of the appellate court to reverse the action of the trial court. (Redding Gold & Copper Min. Co. v. National Surety Company, 488.)
8. **VACATING DEFAULT JUDGMENT UNDER SECTION 473—SHOWING REQUIRED.**—Where a default and judgment have been regularly entered against a litigant, such default and judgment cannot be set aside and vacated except upon a showing, under section 473 of the Code of Civil Procedure, that they were taken against him through his mistake, inadvertence, surprise, or excusable neglect. (Id.)
9. **CONTRARY SHOWING—FAILURE TO ANSWER OR OBTAIN EXTENSION AFTER NOTICE OF DEMURRER OVERRULED—INEXCUSABLE NEGLIGENCE—ABSENCE OF SURPRISE.**—Where there is nothing in the record to sustain the showing required, but it appearing that the defendant's attorney was served with a notice of the overruling of a demurrer to the complaint, he thereby had notice that the time within which the defendant could answer to the complaint was running against him, and in failing to take any action toward answering or getting more time to answer, the showing is one of inexcusable neglect. Neither could there be any surprise at the judgment taken against him, in any legal sense. (Id.)
10. **UNTENABLE DEMURRER—GROUND NOT APPEARING UPON FACE OF COMPLAINT.**—It cannot be claimed that the demurrer to the complaint was tenable in support of the order vacating the default and judgment, where it purported to raise the point of the want of capacity of a foreign corporation to sue under the law of this state, which did not appear upon the face of the complaint. Such demurrer was without merit, and was properly overruled. (Id.)
11. **MOTION TO VACATE FOR WANT OF SERVICE OF SUMMONS—AFFIDAVIT OF MERITS NOT REQUIRED.**—Where a motion to vacate a judgment by default is promptly made upon the ground that the defendant has never been served with summons, and that the court did not obtain jurisdiction over the defendant, no affidavit of merits is required; and an objection upon appeal from an order granting the motion that an affidavit of merits served and filed with the motion was insufficient cannot be considered. (German Savings & Loan Soc. v. Bien, 267.)

JUDGMENT (Continued).

12. **BENEFIT OF CODE SECTION NOT INVOKED—MERITORIOUS DEFENSE NOT REQUIRED—ABSOLUTE RIGHT TO VACATE VOID JUDGMENT.**—In such case the moving party is not invoking the benefit of section 473 of the Code of Civil Procedure, but is asking for the absolute right to have a judgment in fact void vacated and set aside and is not required to show that he has a meritorious defense to the action as a condition to the granting of such right. (Id.)
13. **CONFLICTING EVIDENCE AS TO SERVICE OF SUMMONS—STATEMENT OF COURT—IMPLIED CONTRARY FINDING.**—Where the motion to vacate the judgment was heard upon affidavits and oral testimony, which was in absolute conflict as to whether or not the moving party had been served with summons, the statement by the court at the close of the evidence as to its opinion that the defendant had been served with summons, which was not signed or filed as a finding of fact, could not conclude the court from subsequently making a finding contrary thereto, which was impliedly done when the court vacated the judgment, which could only be done upon the ground stated in the notice of motion, that the moving party had never been served with process. (Id.)
14. **IMPLIED FINDING SUPPORTED BY EVIDENCE.**—The implied finding was supported by the evidence of the respondent, though in direct conflict with that of the appellant. (Id.)
15. **ORDER VACATING JUDGMENT BY DEFAULT—DEMURRER UNDER ORDER EXTENDING TIME TO ANSWER—GOOD FAITH—JUDGMENT WITHOUT NOTICE—PROPER DISCRETION.**—Where, under an order extending time to answer, the attorney for the defendants filed a demurrer, and it is not disputed that he believed he had a right to file the same, and no objection was made by plaintiff when the demurrer was filed, but plaintiff's attorney without notice procured an order striking out the demurrer and a judgment by default, and the motion to vacate the judgment by default was promptly made, and it was manifest that the plaintiff had suffered no injury, it is held the court by its order vacating the judgment by default, and permitting the defendants to answer, exercised its discretion in accordance with the soundest principles of justice. (Broderick v. Cochran, 202.)
16. **MISAPPREHENSION OF LAW—POWER OF COURT TO RELIEVE PARTIES FOR MISTAKES OF ATTORNEYS.**—In believing that the attorney for the defendant might demur after having taken time by order of the court to answer only, it is conceded that he was acting under a misapprehension of law. But courts have power under the provisions of section 473 of the Code of Civil Procedure to relieve parties from mistakes as to the legal effect of acts of their attorneys. (Id.)
17. **AFFIDAVIT OF DEFENDANT SERVED WITH NOTICE OF MOTION.**—An affidavit of one of the defendants served with the notice of the motion, though not embodied in the notice, sufficiently apprised the attorney

JUDGMENT (Continued).

for the plaintiff that such affidavit would be relied upon at the hearing of the proceeding, and it is held that this amounted to a substantial compliance with the provisions of section 1010 of the Code of Civil Procedure. (Id.)

- 18. AFFIDAVIT OF ATTORNEY FOR DEFENDANTS—SUPPORT OF ORDER.**—It is held that the affidavit of the attorney for defendants alone contains all essential facts necessary to sustain the order vacating the judgment by default. (Id.)

See Appeal, 1, 3, 7-10, 13-15; Community Property; Divorce, 1-6; Estates of Deceased Persons, 12-15; Estoppel; Findings; Mortgage, 19, 20; Quieting Title, 2-4; Taxation, 3, 4.

JURISDICTION. See Accounting, 3-8; Certiorari; Contempt; Criminal Law, 7, 8, 59; Estates of Deceased Persons, 13, 14; Justice's Court, 5; Prohibition; State Lands, 80.

JURY AND JURORS. See Criminal Law, 91, 92.

JUSTICE'S COURT.

- 1. APPEAL FROM JUSTICE'S COURT—RULE OF SUPERIOR COURT REQUIRING DEPOSIT OF CLERK'S COSTS—PROPER GROUND FOR DISMISSAL.**—The superior court may by rule reasonably require an appellant from the justice's court within thirty days after the filing of the transcript upon appeal to deposit with the clerk the sum of six dollars for his costs upon the appeal, under penalty for failure to do so of a dismissal of the appeal, upon motion after notice to the appellant. (Behymer v. Superior Court, 464.)
- 2. DEPOSIT OF COSTS AFTER NOTICE OF MOTION TO DISMISS—EXCUSE FOR DELAY—COUNTER-AFFIDAVIT—DISCRETION NOT ABUSED.**—Where after default of the appellant, and notice of motion to dismiss, the appellant deposited the costs and urged as an excuse for the delay the purpose of appellant's counsel to comply with the rule, and for forgetfulness, owing to his weakened physical condition after an operation by a physician, rendering him for a time unfit to transact business, but it was shown by a counter-affidavit that appellant's counsel stated as a reason for not complying with the rule that appellant had not paid him the costs, and that he had refused to advance the same for his client, it cannot be said that the court abused its discretion in dismissing the appeal. (Id.)
- 3. GROUND FOR RELIEF UNDER SECTION 473 NOT SHOWN—WRIT OF MANDATE DISALLOWED.**—Where it appears from the affidavit of appellant's counsel that he was familiar with the rule requiring the deposit of costs within thirty days, and that he intended to pay the same, and there was a conflict in the evidence as to his excuse for not paying the same, the showing is not such as would entitle the plaintiff to relief under section 473 of the Code of Civil Procedure; nor is he entitled to a writ of mandate to compel the superior court

JUSTICE'S COURT (Continued).

to set aside the order dismissing the appeal and to entertain the same. (Id.)

4. **APPEAL—EXCEPTION TO SURETIES—SERVICE OF NOTICE BY MAIL—INSUFFICIENT AFFIDAVIT.**—Where the notice of exception to the sureties upon appeal from the justice's court was served by mail, and the affidavit of service thereof does not show that the attorneys for the plaintiff and the defendant resided in different places, or that there was any communication by mail between them, such affidavit is insufficient to establish the fact of substituted service by mail, under section 1012 of the Code of Civil Procedure. (*Rubenstein v. Superior Court*, 128.)
5. **REFUSAL OF SUPERIOR COURT TO DISMISS APPEAL—WRIT OF REVIEW—ASSUMED RIGHT TO SHOW PERSONAL SERVICE—ERROR IN EXERCISE OF JURISDICTION.**—Assuming the right of the petitioner for a writ of review to annul the action of the superior court in refusing to dismiss the appeal for nonjustification of the sureties after insufficient proof of service of notice thereof by mail, to adduce other evidence touching the acts of the parties, tending to show personal service of the notice of exception to the sureties, yet, nevertheless, it was within the jurisdiction of the superior court to determine the sufficiency of such proof, if any was offered; and the writ of review will not lie for any error in the exercise of jurisdiction. (Id.)
6. **DEMURRER AFTER TIME TO ANSWER—DEFAULT—PROMISE OF JUSTICE—TRIAL WITHOUT NOTICE—INEFFECTIVE APPEAL—IMPROPER WRIT OF REVIEW.**—Where it appears that, on the fifth day after service of summons from a justice's court requiring answer in three days, defendant filed a demurrer, and his default was entered on the same day, and that nine days thereafter the justice promised defendant to take no action during his absence on vacation, but entered no order to that effect, and the trial was had four days thereafter, in defendant's absence, without notice to him, and judgment was entered, without passing upon the demurrer, after knowledge of which defendant took an ineffective appeal therefrom, it is held that, after the time for appeal had expired, the superior court erred in granting a writ of review to annul the judgment and ordering the justice to pass upon the demurrer. (*Green v. Rogers*, 572.)
7. **PRESUMPTION AS TO TIME OF FILING DEMURRER—FAILURE TO AVER FILING BEFORE DEFAULT.**—Since it appears that the filing of the demurrer and the entry of default took place on the same day, and it is not alleged whether the filing of the demurrer was prior or subsequent to the entry of default, and it was clearly filed after the expiration of the time to answer, it must be presumed that it was filed after the entry of the default, and if so filed it conferred no right without first having the default vacated, which does not appear to have been asked for or entered. (Id.)

JUSTICE'S COURT (Continued).

8. **EFFECT OF FILING AFTER DEFAULT—NOTICE OF TRIAL NOT REQUIRED.**—The subsequent filing of the demurrer, after default, did not prevent the court from setting the case for trial, and trying it without notice to defendant, since, being in default, he was not entitled to such notice. (Id.)
9. **PROMISE BY JUSTICE—NOTICE TO PLAINTIFF NOT SHOWN—RIGHT TO SPEEDY TRIAL.**—Since it does not appear that the plaintiff, who had entered the default of the defendant, had any notice or knowledge of the verbal promise of the justice to the defendant, and the action being one for the summary restitution of leased property, the plaintiff had the right to a speedy trial thereof, in the absence of the defendant, after proper proof of the entry of his default. (Id.)
10. **CONDITIONS OF WRIT OF REVIEW—ABSENCE OF REMEDY BY APPEAL—LOSS BY LACHES A BAR TO WRIT.**—The writ of review issues only where there is no remedy by appeal which has existed, and where the petitioner has failed to avail himself of that remedy, or the right of appeal has been lost by his laches, so that the time in which he might have taken an appeal has thus gone by, the remedy by the writ of review is not open to him. (Id.)
11. **OFFICE OF WRIT LIMITED TO ANNULMENT.**—Section 1074 of the Code of Civil Procedure plainly limits the power of the court, upon a writ of review, to the determination of the single question whether the inferior tribunal has exceeded its jurisdiction or has regularly pursued its authority, and where it has not regularly pursued its authority, the writ should be limited to the annulment of its proceedings, and should not direct any affirmative action to be taken by the inferior tribunal. (Id.)

See Criminal Law, 59, 60.

JUSTICE OF PEACE. See Office and Officers, 1-8; Prohibition.

JUVENILE COURT.

1. **CRIMINAL LAW—SUFFICIENCY OF INFORMATION—CONTRIBUTING TO DELINQUENCY OF DEPENDENT FEMALE CHILD.**—An information charging that the defendant contributed to the delinquency of a dependent female child of the age of about sixteen years, which alleges that she was "then and there a female dependent minor child in this, that 'she' had no parents or guardians willing and capable of exercising proper mental control over" her, and that "her home" was and is, by reason of neglect on the part of her guardian, an unfit place for "her," and that "she was in danger of growing up to lead an idle, dissolute and immoral life," states facts from which the conclusion necessarily follows, under the juvenile court law (Stats. 1911, p. 626), that the female child was a "dependent per-

JUVENILE COURT (Continued).

son." It need not state that she was adjudged to be such, unless an adjudication is relied upon; otherwise the facts must be stated. (*Edington v. Superior Court of Yolo County*, 739.)

2. **MODE OF PROSECUTION OF OFFENSE.**—Though the juvenile court law contemplates an information without any preliminary examination, a preliminary examination prior to an information filed thereunder by the district attorney may be treated as surplusage. It is sufficient that the superior court exercising the functions of a juvenile court has jurisdiction over the offense. If it be admitted that the prosecution should be entitled in the juvenile court, instead of in the superior court, the failure to do so is a mere irregularity not affecting the jurisdiction of the court. It is sufficient that it shows a prosecution under the juvenile court law. (*Id.*)
3. **REFUSAL OF WRIT OF PROHIBITION.**—A writ of prohibition will not be granted to restrain the superior court from trying an offense under the juvenile court law, under an information filed by the district attorney after a preliminary examination before a magistrate. (*Id.*)

See *Office and Officers*, 4-8.

LACHES. See *Divorce*, 5, 6; *Specific Performance*, 5; *Vendor and Vendee*, 28.

LANDLORD AND TENANT.

1. **RULE AS TO FORCIBLE EVICTION FROM SUBSTANTIAL PART OF PREMISES INAPPLICABLE TO INSIGNIFICANT PART.**—The rule that if a tenant is forcibly evicted by the landlord from a substantial part of the demised premises, and the lease is not terminated, there can be no apportionment of rent, and the tenant cannot be compelled to pay the rent reserved, and that an actual ouster is not necessary to constitute an eviction, since any act of the lessor which results in depriving the lessee of the beneficial enjoyment of the premises will constitute an eviction, does not apply when it does not appear that the interference has resulted in depriving the lessee of a substantial, as distinguished from an insignificant or inconsequential, portion of the demised premises. (*Kelley v. Long*, 159.)
2. **ACTION FOR RENT—POSSESSION OF LESSEE NOT CHANGED—TRESPASS UPON APPURTENANT WATER RIGHT—DAMAGES—RENT NOT EXTINGUISHED.**—Where it appears that the lessee sued for rent was at all times in the actual possession and occupancy of the premises and of the water rights appurtenant thereto, except that it is found that a comparatively small portion of the water was wrongfully taken with the knowledge and consent of the lessor, on or about April 1st of one year, and that the damage resulting therefrom could be measured in money was the sum of \$40 only, which was deducted from the

LANDLORD AND TENANT (Continued).

rent reserved, it is held that the act of interference amounted to no more than a mere trespass, and that there was no eviction from a substantial part of the premises that could extinguish the rent. (Id.)

3. **CONSISTENCY OF FINDINGS—MERE PASSING TRESPASS NOT INCONSISTENT WITH POSSESSION.**—Since no mere passing trespass amounts to an interference with possession, the finding that the defendant had the sole and exclusive possession of the demised premises and the appurtenant water rights is not in conflict with the finding that a third party named, with the knowledge and consent of the plaintiff, interfered with said water rights, to defendant's detriment in a specified sum awarded to defendant, on one occasion only. (Id.)
4. **SUPPORT OF FINDING AS TO TRESPASS—CONFLICTING EVIDENCE—RESPONDENT NOT ENTITLED TO RELIEF.**—It is held that, although there is some evidence urged by respondent which might have sustained a finding that the third person named had the right to divert a portion of the water for use on his land during defendant's term as lessee, yet as there is some evidence supporting the finding that he was a trespasser, and not authorized to use any part of the water, this court cannot change the finding, and that the respondent, not having appealed, is not in a position to ask for such relief. (Id.)

See Lease.

LARCENY. See Criminal Law, 61-67.

LEASE.

1. **ACTION ON BOND FOR RENT—SIGNATURE BY PARTNERSHIP—MODIFICATION OF RENT IN CORPORATE NAME—PERSONAL LIABILITY—SUPPORT OF FINDING.**—In an action upon a lease for rent and upon a bond to secure unpaid rent, which was signed by appellant as "Joseph Herrscher & Co.," which lease was subsequently modified by consent of appellant to the reduction of rent, under the signature, "For Joseph Herrscher, Inc., Joseph Herrscher," it is held the evidence in regard to such signature is sufficient to sustain a finding that the appellant intended to and did bind himself personally to the obligations of the bond, and that he personally assented to the modification of the lease, and that it was brought about through his personal negotiations with plaintiffs. (*Deming v. Maas*, 330.)
2. **SURPLUSAGE IN USE OF PARTNERSHIP NAME.**—Where it appears that the use of the partnership name was simply to designate the mere style under which the appellant individually conducted his own personal business, and that no other person was associated with him therein, the words "& Co.," appended to his signature to the bond, may be disregarded as surplusage, and the signature to

LEASE (Continued).

the bond so expressed bound the appellant individually to the terms of the bond. (Id.)

3. **USE OF CORPORATION NAME IN MODIFYING LEASE—PERSONAL CONTROL OF WHOLE STOCK—"CORPORATE DOUBLE" OF HIMSELF.**—Where the corporation name used by appellant in securing the modification of the lease included the use of appellant's own name, and was signed by his own name for the corporation, and the evidence shows that he had the personal control of all of its stock and held it all in his own name, with the exception of five shares, one of which was transferred to his bookkeeper and four others to members of his own family, merely to qualify them as directors, it is held that, under these circumstances, his subscription of the corporate name to such modification was both the act of the corporation and his act as an individual. He was, in such case, virtually the corporation itself, which was his "corporate double." (Id.)
4. **EVIDENCE—PROPER ADMISSION OF DOCUMENTS.**—The court, under the legal effect of the evidence concerning the signatures to the bond and to the written modification of rent, properly admitted each of them in evidence. (Id.)

See Guaranty, 7-12; Landlord and Tenant.

LIENS. See Mechanic's Lien; Mortgage; Street Assessment.

LIFE INSURANCE. See Insurance, 5-9.

LIS PENDENS. See Title to Land, 2.

MANDAMUS. See Benevolent Society, 4, 5; Election; Eminent Domain; Employer and Employee, 3, 4; Justice's Court, 3; Municipal Corporations, 3; Office and Officers, 3, 8, 9; Water and Water Rights, 4.

MARRIAGE. See Criminal Law, 110, 111; Divorce.

MEASURE OF DAMAGES. See Damages.

MECHANIC'S LIEN.

1. **FORECLOSURE—PLEADING—TIME FOR PERFORMANCE OF WORK—GENERAL DEMURRER—CAUSE OF ACTION.**—A complaint in an action to foreclose a mechanic's lien, which alleges the performance of ten days and seven hours' work upon the building between the first day of June and the twenty-first day of July, 1909, and that the building was completed on the sixth day of July, 1909, shows that sufficient time elapsed for the completion of such work before the completion of the building, and is not subject to a general demurrer

MECHANIC'S LIEN (Continued).

on the ground that it does not state a cause of action. (*Webster v. Carr*, 772.)

2. **GROUND OF SPECIAL DEMURRER FOR UNCERTAINTY—ABSENCE OF SPECIAL DEMURRER—WAIVER.**—The only ground of objection to the complaint is that it is uncertain as to the time within which the work was performed, and when it ceased; but in the absence of a special demurrer on that ground, objection to such uncertainty is waived, and cannot be considered upon appeal. (*Id.*)
3. **FORECLOSURE—PLASTERING—DEFENSE OF UNREASONABLE DELAY—SUPPORT OF FINDING.**—In an action to enforce a mechanic's lien against the owner of a building for the plastering done by the plaintiff, where the answer pleads unreasonable delay in the prosecution of the work, by which plaintiff was damaged in the loss of rents, it is held that a finding against such unreasonable delay on plaintiff's part is sustained by evidence that any delay was caused by others over whom the plaintiff had no control, and that the work was begun as soon as the building was in readiness for lathing and plastering, and was accomplished with diligence thereafter. (*Manix v. Wilson*, 595.)
4. **INADMISSIBLE EVIDENCE—CONTRACT AND SPECIFICATIONS—DELAY OF CONTRACTOR IN COMPLETION OF BUILDING.**—The contract and specifications were not admissible in such action to foreclose the plasterer's lien, for the purpose of showing that the contractor was liable to the owner, under the terms of the contract, for all loss and damage resulting from his delay and failure to complete the building within the time designated in the contract, although such contract would be valid as between the contractor and the owner. (*Id.*)
5. **DEDUCTION OF DAMAGES TO OWNER FROM LAST PAYMENT NOT ALLOWABLE AGAINST LIEN CLAIMANTS—CONSTITUTIONAL RIGHT PROTECTED.**—The right of the owner to deduct stipulated damages as against the contractor cannot be allowed as a deduction from the last payment, to the injury of lien claimants, whose right to liens are guaranteed by the constitution and protected by the legislature, especially as regards payment of such liens out of the last payment of twenty-five per cent of the contract price; and to permit that fund to be sequestered in the interest of the owner as against the contractor would be to deprive lien claimants of their constitutional right to enforce their liens. (*Id.*)
6. **SEQUESTRATION OF FUND BY NOTICE—SETTLEMENT WITH CONTRACTOR AT PERIL.**—Where plaintiff, when there was \$7,000 unpaid on the contract served a notice upon the owner to withhold therefrom the full amount of his claim for plastering, pursuant to section 1184 of the Code of Civil Procedure, the owner was thereby required to sequester therefrom sufficient money fully to meet the plaintiff's demand, and any money that might be necessary to meet any claim of lien which might be filed therefor; and where the owner

MECHANIC'S LIEN (Continued).

settled with the contractor without reserving sufficient money to meet the plaintiff's demand, he did so at his peril. (Id.)

7. **SETTLEMENT WITH CONTRACTOR INCLUSIVE OF ALL CLAIMS EXCEPT PLAINTIFF'S—ABATEMENT NOT ALLOWABLE.**—Where the settlement by the owner with the contractor included a settlement of all claims against the owner, with the exception of the plaintiff's claim, it must be presumed that the owner was allowed, as against the contractor in such settlement, all that he was entitled to, including all claim he might have for a reduction of the contract price in consequence of delay; and after such full settlement of all other claims the owner cannot urge any abatement of the plaintiff's claim. (Id.)
8. **ACCEPTANCE OF BUILDING FROM CONTRACTOR—WAIVER OF DAMAGES FOR NONPERFORMANCE.**—The acceptance of the building by the owner from the contractor, in the absence of any showing of fraud or mistake, implies a waiver of any claim for damages against the contractor by the owner, on account of the nonperformance of the contract in any particular. (Id.)
9. **OWNER BY SETTLEMENT UNCONDITIONAL GUARANTOR OF CONTRACTOR'S OBLIGATION TO PLAINTIFF.**—The owner by the settlement with the contractor became an unconditional guarantor of the contractor's obligation to pay the plaintiff for his work, his liability being co-extensive with that of the contractor to the plaintiff. In the absence of any defenses existing between the contractor and the plaintiff and of any fault on the part of the plaintiff, the owner is liable to him for the debt. (Id.)
10. **ABANDONMENT OF CONTRACT—PREMATURE PAYMENT BY OWNER TO CONTRACTOR.**—Where a contract has been abandoned by the contractor, the owner is not entitled to any credit on account of a premature payment made by him to the contractor not earned, as against existing lien claimants, notwithstanding no notice to withhold was served upon the owner. The only deductions permissible from the ascertained value of the labor done and material furnished, where the contractor abandons the contract before completion, are for payments then due and actually paid, and none are permissible for sums then due and not actually paid, or for sums actually paid but not then due. (Olson-Mahoney Lumber Co. v. Maxwell, 668.)
11. **ERRONEOUS ORDER GRANTING NEW TRIAL TO OWNER OF BUILDING.**—It is held that the record upon appeal by a lien claimant from an order granting a new trial to the owner of the building does not show the existence of a single valid ground upon which such order, general in its terms, can be supported. (Id.)
12. **OBJECTION TO LEADING QUESTION TO WITNESS FOR PLAINTIFF—DISCRETION NOT ABUSED.**—Where the yard foreman of the plaintiff had testified fully as to the delivery of plaintiff's lumber at the place

MECHANIC'S LIEN (Continued).

where the building was being erected, objection overruled to a leading question asked of the witness was not prejudicial, where the answer thereto would be merely cumulative of that already given. Ordinarily, objections to leading questions should be sustained, but it is the established rule in this state that the allowance of such questions rests largely in the discretion of the trial court; and that a new trial will not be ordered merely because leading questions were permitted over objection, unless it plainly appears that the trial court abused its discretion. It is held that it was not here abused. (Id.)

13. **RULINGS UPON EVIDENCE NOT ERRONEOUS.**—Rulings upon evidence are not erroneous where the witness under examination was unable to answer a question objected to, and there is confusion in the record as to whether another question was ever answered; but assuming that it was answered, since the question called for relevant, material and competent testimony, the objection thereto was properly overruled. (Id.)
14. **ABSENCE OF ERROR IN DENYING MOTION FOR NONSUIT.**—It is held that there was no error in denying defendant's motion for a nonsuit, both for the reason that no grounds were stated for the motion, and that the plaintiff had introduced sufficient evidence to make a *prima facie* case. (Id.)
15. **SUPPORT OF FINDINGS AS TO PLAINTIFF'S LIEN.**—There is no ground on which the evidence can be deemed insufficient to sustain the findings in favor of the plaintiff's lien as against a premature payment made by the builder to the contractor after the abandonment of the contract, under the provisions of section 1200 of the Code of Civil Procedure. (Id.)

MISTAKE. See Judgment, 15-18.

MORTGAGE.

1. **PURCHASE OF SECURED NOTE—NON-NEGOTIABILITY—SUBJECTION OF PURCHASER TO DEFENSES—PAYMENT OF FACE WITHOUT KNOWLEDGE IMMATERIAL.**—A note which shows on its face that it is secured by a mortgage is non-negotiable, and notice of such non-negotiability is thereby imparted to a purchaser thereof, and he is chargeable with notice that if the maker has any defense against the original payee, he takes the note subject to such defense, and it is immaterial that he has paid the full face of the secured note to the original payee, without actual notice of any defense thereto. (*Helmer v. Parsons*, 450.)
2. **ASSIGNMENT OF MORTGAGE—DUTY OF PROPOSED ASSIGNEE TO INQUIRE AS TO DEFENSES—EFFECT OF NEGLIGENCE.**—One who is about to take an assignment of a mortgage is in duty bound, in protection

MORTGAGE (Continued).

of his own interest, to make inquiry of the mortgagor as to the validity of the instrument and of the transaction on which it is founded and as to the amount due, and whether the mortgagor has any defense or setoff to interpose against it. But if he neglects to make such inquiry, he takes the mortgage subject to all defenses against the original mortgagee, and is charged with knowledge of all facts which such an inquiry would have disclosed. (Id.)

3. **CONSTRUCTION OF CODE PROVISIONS—INDORSEMENT OF NON-NEGOTIABLE INSTRUMENT—ASSIGNMENT OF THING IN ACTION.**—Section 1459 of the Civil Code, making the transfer of a non-negotiable instrument "subject to all equities and defenses existing in favor of the maker at the time of the indorsement," and section 368 of the Code of Civil Procedure, providing that, "in the case of an assignment of a thing in action [not negotiable] the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment," are to be construed as though passed at the same moment of time and as parts of the same statute; and the law as declared by the two sections is that a defendant may avail himself of any setoff or defense acquired before notice of assignment of any non-negotiable cause of action. (Id.)

4. **PARTIAL FAILURE OF CONSIDERATION OF NOTE AND MORTGAGE EXISTING AT TIME OF TRANSFER—NOTICE OF ASSIGNMENT IMMATERIAL.**—Where the payee of a note and mortgage for \$3,500 agreed to advance that full sum to the mortgagor in specified installments, but only advanced the total sum of \$1,250, the partial failure of consideration as to the residue of the note and mortgage being a complete defense as to the residue against the original payee, which existed at the time of the transfer of the note and mortgage by the payee to the plaintiff, it would be a like defense as against the plaintiff, as assignee, which cannot be affected by any notice of the assignment given by the assignee to the defendant. (Id.)

5. **RECORDING OF ASSIGNMENT OF MORTGAGE NOT CONSTRUCTIVE NOTICE TO MORTGAGOR.**—The mere recording by the assignee of the assignment of the mortgage only operates, under section 2934 of the Civil Code, as notice to all persons subsequently deriving title to the mortgage from the assignor, and constitutes no constructive notice of the assignment to the mortgagor. (Id.)

6. **ACTION FOR CONVERSION OF MORTGAGED PERSONAL PROPERTY BY CONSTABLE—NOTICE BEFORE SALE—PLEADING—CAUSE OF ACTION STATED.**—A complaint in an action by a mortgagee of personal property situated in Los Angeles county, and mortgaged by a resident of Riverside county, which alleges that it was recorded in Los

MORTGAGE (Continued).

Angeles county only, that defendant, who is a constable in a specified township in the latter county, converted said mortgaged property by levying upon and selling the same, without paying or tendering to plaintiff the amount of the debt due to plaintiff, the payment of which was secured by said mortgage, that the value of the mortgaged property so converted was the sum of \$600; and that prior to the sale and conversion of said personal property the plaintiff informed defendant of the existence of said chattel mortgage, and the claim of the plaintiff thereunder, states a cause of action, and a general demurrer thereto was properly overruled. (*Bonning v. Way*, 527.)

7. **EFFECT OF FAILURE TO RECORD CHATTEL MORTGAGE IN MORTGAGOR'S COUNTY—QUALIFIED INVALIDITY—PLEADING REQUIRED BY DEFENDANT.**—The failure of the mortgagor to record the chattel mortgage in the county of his residence, as expressly required by section 2959 of the Civil Code, when taken in connection with section 2957 thereof, renders the chattel mortgage void "as against the creditors of the mortgagor, and subsequent encumbrancers of the property in good faith for value." It is held that, as these enumerated classes do not appear to include the defendant, he is not in a position, without pleading the fact, to avail himself of the benefit thereof. (*Id.*)
8. **CONSTRUCTION OF CODE PROVISIONS AS TO CHATTEL MORTGAGES—MODIFICATION OF FORMER PROVISIONS.**—Although the chattel mortgage in question comprised personal property not specified in section 2955 of the Civil Code as subject thereto, and although the mortgagor failed to record it in the county of his residence, as provided in sections 2957 and 2959 of the same code, yet each of those sections is qualified by the later provisions of section 2973 of the Civil Code, adopted in 1905, providing that "mortgages of personal property other than that mentioned in section 2955, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs and assigns, and personal representatives, and persons who, before parting with value, have actual notice thereof." (*Id.*)
9. **INSUFFICIENT DEFENSE TO ACTION FOR CONVERSION—LEVY AND SALE AGAINST VENDEE OF MORTGAGOR—BONA FIDE PURCHASE FOR VALUE NOT ALLEGED.**—An alleged defense to the complaint, in the action for conversion, that the levy and sale by the constable defendant was against a vendee of the mortgagor, as the owner of the property mortgaged, which fails to aver that such vendee was a purchaser in good faith and for value, is insufficient. Under section 2957 of the Civil Code, to render the mortgage void as against such vendee, it must appear by allegation, proof and finding that the purchase was in good faith and for value, and in the absence thereof,

MORTGAGE (Continued).

the position of the vendee with reference to the property is identical with that of the vendor. (Id.)

10. **SUPPORT OF FINDING AS TO NOTICE OF MORTGAGE TO DEFENDANT—ADMISSION OF VALUE OF MORTGAGED PROPERTY—FINDING NOT REQUIRED.**—It is held that the evidence sufficiently supports the finding that the defendant had actual notice of the existence of plaintiff's chattel mortgage before the sale made by the defendant; and where the answer made a mere conjunctive denial that the property was of the value of \$600, such denial constituted an admission of any less sum, and must be deemed evasive, and in fact no denial at all, and no finding thereon was required. (Id.)
11. **IMMATERIAL FINDING—SALE OF "GREATER AND BEST PART OF PROPERTY"—CONVERSION—FAILURE TO REDELIVER.**—It is held that a finding that the defendant took and carried away the whole of the mortgaged property, "and sold the greater and best portion thereof," is immaterial as to the latter part of the finding. The right to recover damages is based upon the conversion, and since no part of the property carried away is shown to have been redelivered, the disposal of the converted property by the officer was not material. (Id.)
12. **CHATTEL MORTGAGE OF PLANING-MILL MACHINERY—SUBSEQUENT FIXTURES TO REALTY—PRECEDENCE OF REAL ESTATE MORTGAGES—WANT OF ACTUAL NOTICE OF CHATTEL MORTGAGE.**—A mortgagee of real property, who took two mortgages thereon to secure different advances to the owner, upon which real property, at the time of their execution, a planing-mill plant was in operation, with its machinery, engine, boiler and other equipments permanently affixed to the realty, is entitled to precedence as to such fixtures over a prior chattel mortgage of the planing-mill machinery, executed and recorded, as such, before its attachment to the realty, where it appears that the mortgagee of the realty made his advances and took his mortgages without actual notice of the existence of the chattel mortgage. (Elliott v. Hudson, 642.)
13. **LEGAL EFFECT OF VALID CHATTEL MORTGAGE AS SUCH.**—So long as mortgaged personal property remains personal property and is not removed from the county where the chattel mortgage is recorded, the mortgagee is protected in his lien as against subsequent purchasers from the mortgagor, for they are charged with constructive notice of the recorded chattel mortgage. But when such property is affixed to land, a different question arises, though as between the chattel mortgagor and mortgagee the lien might not be thus defeated. (Id.)
14. **EFFECT OF CHATTEL MORTGAGE OF PLANING-MILL PROPERTY—WHEN AFFIXED TO REALTY—ABSENCE OF CONSTRUCTIVE NOTICE TO REAL ESTATE MORTGAGEE.**—The mere fact that the mortgaged planing-

MORTGAGE (Continued).

mill property was of such a character as required it, for practical purposes, to be affixed to land, is not sufficient, after it has become attached to the realty, to put a subsequent mortgagee of the land upon inquiry as to the existence of the chattel mortgage, or to charge him with constructive notice thereof. Such subsequent mortgagee had the right to assume that he was purchasing real property, regardless of the fact that it was necessarily personal property before it was affixed to and became part of the land. (Id.)

15. CONSTRUCTION OF CODE AS TO RECORD OF CHATTEL MORTGAGE.—Section 2963 of the Civil Code, which expressly requires chattel mortgages to be recorded in a separate volume, is to be construed, in relation to its further provision that mortgages of personal property may be acknowledged and recorded "in like manner as grants of real property," to mean that the chattel mortgage is constructive notice of what it contains, and cannot be regarded as notice in anywise affecting the title to real property. (Id.)

16. NATURE OF RECORD OF CHATTEL MORTGAGE AND OF REALTY—DUTY OF SEARCH.—A chattel mortgagee is chargeable only with notice of a prior recorded chattel mortgage on the same property, and he is not required to look to the record of the deeds or mortgages of realty for prior encumbrances. And so, also, a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records of chattel mortgages, as he is not affected by the record of a chattel mortgage upon fixtures of the realty, and a purchaser or mortgagee of the realty need only inquire for liens on real estate. (Id.)

17. COMMENT OF SUPREME COURT IN ORDER DENYING REHEARING.—The supreme court in its order denying a rehearing approves of the ruling that a purchaser or mortgagee of land need not examine the record of chattel mortgages in so far as it applies to chattels of the character involved in this case. Upon the question whether it applies to all property mortgageable as chattels, including growing crops, no opinion is expressed, as it is not involved in this case (Id.)

18. UNTENABLE REPLEVIN BY CHATTEL MORTGAGEE—FINDING—PRIORITY OF REAL ESTATE MORTGAGES.—The chattel mortgagee cannot maintain an action of replevin to recover the possession or value of the planing-mill machinery mortgaged which was affixed to the land, as against the mortgagee of the land, who had purchased the same at a sale under foreclosure, and had taken his mortgages without actual knowledge of the existence of the chattel mortgage. It is held that the court was justified in finding in such action that the real estate mortgages took priority over the chattel mortgage. (Id.)

19. FORECLOSURE OF MORTGAGES—RECEIVER OF RENTS AND PROFITS—DISPOSITION—DEFICIENCY JUDGMENT ASSIGNED—RIGHTS LIMITED TO

MORTGAGE (Continued).

PURCHASER—REVERSAL.—Where a receiver, appointed during foreclosure of the real estate mortgages, to receive the rents and profits of the mortgaged land, settled his accounts after the mortgagee had purchased the property under the decree, and taken a deficiency judgment against the corporation mortgagor, which had assigned all of its property to a trustee for the benefit of its creditors, and after the deficiency judgment of the mortgagor had been assigned to the same trustee, it is held that the court erred in applying the rents and profits upon such deficiency judgment, and that the judgment must be reversed, in so far as to direct the court to ascertain and apply only such portion of the rents and profits as belonged solely to the purchaser at the sale. (Id.)

20. **JUDGMENT IN FORMER ACTION NOT PLEADABLE IN BAR—RECEIVER SUED INDIVIDUALLY—DIFFERENT PARTIES.**—A judgment in a former action of the same general character brought by the same plaintiff against the real estate mortgagee and the receiver, sued individually, in which the plaintiff was nonsuited as to the mortgagee, and judgment was rendered against the plaintiff in favor of the receiver as an individual, cannot be pleaded in bar of the present action against the mortgagee individually and the receiver sued in his official capacity, who is not the same person as when sued individually, and who is not liable in his individual capacity. A judgment, to be a bar, must be between the same parties, in the same capacity, and must be "in respect of the matter directly adjudged." (Id.)

See Vendor and Vendee, 7.

MUNICIPAL CORPORATION.

1. **MUNICIPAL ORDINANCE—STANDING OF CARRIAGES ON STREETS—HABEAS CORPUS—ALLEGED UNCONSTITUTIONALITY NOT APPARENT—REMAND TO CUSTODY.**—Where a petitioner for a writ of *habeas corpus*, who has been held for a violation of a city ordinance regulating the standing of carriages on the streets of the city, having made default in the payment of a fine for its violation, assigns as a ground for discharge that the ordinance is unconstitutional and void, but has filed no brief, and cited no authority for his contention, it is held not the duty of this court to seek for some reason for his discharge on the ground proposed, and where from an inspection of the ordinance it discloses no apparent infirmity, the petitioner will be remanded to the proper custody. (Matter of Anderson, 593.)
2. **APPROPRIATE ACTION OF COURTS ON QUESTIONS OF CONSTITUTIONALITY.**—Courts will not hold statutes or ordinances unconstitutional unless it is clearly shown that they are inconsistent with the fundamental law. (Id.)
3. **SAN FRANCISCO CHARTER—CLASSIFICATION OF CLERICAL SERVICE—DUTIES OF OFFICE—IMPROPER BASIS OF SALARIES—RESCISSION—**

MUNICIPAL CORPORATION (Continued).

MANDAMUS.—The charter of the city and county of San Francisco requires the clerical service thereof to be based upon the duties to be performed by the clerks as classified by departments, and a classification by salaries is unauthorized by the charter. Where the municipal civil service commission had made an improper classification of the clerical service, by salaries, they were justified in rescinding the same and restoring a former classification as authorized by the charter; and a writ of mandate will not lie to compel the commissioners to restore the list of eligibles based upon an examination held under the classification by salaries. (*Hinton v. Bahr*, 53.)

See Counties.

MURDER AND MANSLAUGHTER. See Criminal Law, 68-90.

MUTUAL, OPEN AND CURRENT ACCOUNT. See Account.

NEGLIGENCE.

1. **CAUSE OF PLAINTIFF'S INJURIES—NEGLIGENT DRIVING OF DEFENDANT'S HORSE AND BUGGY—SUPPORT OF FINDING AS TO OWNERSHIP AND CONTROL—PROOF OF LIABILITY.**—Where the alleged cause of plaintiff's injuries was the negligent driving of defendant's horse and buggy, and it was an admitted fact that the horse and buggy belonged to the defendant corporation, and that the driver was its vice-president and general superintendent of its work, "who had the right to operate the buggy" in the performance of its work, a finding of defendant's ownership of the horse and buggy, and that it was "wholly in the possession and control of the defendant at the time of the injury," was sufficiently sustained; and that the injury was the result of the negligence of such driver is all that need be shown to charge defendant with liability. (*Jessen v. Peterson, Nelson & Co.*, 349.)
2. **ACCEPTED RULE AS TO NEGLIGENCE OF EMPLOYEE INTRUSTED WITH CHARGE OF VEHICLE.**—It is the accepted rule that, where an employee is intrusted with the possession and operation of a vehicle, with permission to use it, in his discretion, in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employee in the use and operation of the vehicle; and, in such a case, it is not necessary for the person seeking damages to prove that, at the time of the injuries, the employee was engaged in executing any particular business or specific command of his principal. (*Id.*)
3. **SUFFICIENCY OF SHOWING OF NEGLIGENCE—TORT IN GENERAL—SCOPE OF EMPLOYMENT.**—That the employee, at the time of the

NEGLIGENCE (Continued).

commission of the tort, was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury. (Id.)

4. **ACTION FOR DAMAGES—NEGLIGENT DRIVING OF TEAM—PLEADING AND FINDING OF ULTIMATE FACT.**—In an action to recover damages for personal injuries resulting from the negligent driving of a team by defendant's servant against the person of the plaintiff, such negligence is the ultimate fact to be pleaded, and is not a legal conclusion; and a finding that "the servant and employee of the defendant in charge of said horse and wagon was driving the same carelessly and negligently" is a finding of an ultimate fact, and not upon a mixed question of law and fact, and is unobjectionable. (Talbot v. Ginocchio, 390.)
5. **SUPPORT OF FINDINGS—CONTRIBUTORY NEGLIGENCE—COLLISION AT LEFT CURB OF STREET—INCREASE OF SPEED—PRUDENCE OF PLAINTIFF.**—Where there is evidence to show that plaintiff was prudently crossing the street, from the right side to the left, after looking to see if there were any teams approaching and, seeing none, was about to alight from the left curb to the sidewalk, when the driver of defendant's horse and wagon approached with increasing speed on the left side of the street and struck plaintiff down and seriously injured her before she could reach the left sidewalk, it is held that the findings that the defendant's employee was negligently driving the horse and wagon and that such negligence caused the injury, and that the plaintiff was not guilty of contributory negligence, were sufficiently supported. (Id.)
6. **RULE IN CASE OF CONFLICTING EVIDENCE OR DOUBT FROM INFERENCE—QUESTION OF FACT.**—Under the rule that, when the evidence is conflicting, or when reasonable men might differ as to the inference which ought to be drawn from the undisputed or proven facts, the question of negligence or contributory negligence is one of fact for the jury and the trial court, it is held that the appellate court cannot say that the trial court was not justified in its findings against the defendant and in favor of the plaintiff injured. (Id.)
7. **STEAM SCALDING OF RAILWAY MAIL CLERK—PERMANENT DISABILITY—SETTLEMENT AND RELEASE—DECEIT—RESCISSION—QUESTION FOR JURY.**—In an action to recover damages for permanent disability to plaintiff, as a railway mail clerk, by scalding from steam, through defendant's negligence, where it appears that defendant's claim agent took advantage of his weak condition to secure a settlement and release of liability for \$1,250, by deceitfully representing that he would be well in two or three weeks and would have no scars, and such settlement and release were pleaded in bar of the suit, it is held that such deceit amounted to actual

NEGLIGENCE (Continued).

fraud under section 1572 of the Civil Code; and where plaintiff before suit rescinded the same, and tendered back the money, it is held a question for the jury whether or not, at the time of the settlement, the plaintiff was so weak mentally that he did not understand what he was doing. (*Edmunds v. Southern Pacific Company*, 532.)

8. **SUPPORT OF VERDICT—CONCLUSIVENESS UPON APPEAL.**—A verdict for the plaintiff in the sum of \$5,000 is held to be amply supported by the evidence in the case; and as it is not the province of the appellate court to review or weigh the evidence, and as the instructions were as favorable to the defendant as could be asked, the verdict must be deemed a final determination in the plaintiff's favor of all the issues in the case, and adversely to the settlement and release pleaded in the defendant's answer. (*Id.*)
9. **COLLISION OF AUTOMOBILE WITH CAR—ACTION FOR PERSONAL INJURIES—PRIOR RECOVERY FOR INJURY TO AUTOMOBILE NOT A BAR.**—An action to recover damages for personal injuries resulting from the negligent collision of defendant's railroad car with plaintiff's automobile, in which he was riding at the time of the collision, is not barred or affected by the recovery in a prior action of damages to plaintiff's automobile, resulting from the same collision. Where damage has been caused to the person and property of the plaintiff by the same tortious act of the defendant, separate actions may be brought for the injury so resulting. (*Schermerhorn v. Los Angeles Pacific Railroad Company of California*, 454.)
10. **PLEADING—JOINDER OF CAUSES OF ACTION—INJURIES TO PERSON AND PROPERTY—CONSTRUCTION OF CODE PROVISION.**—A plaintiff, under section 427 of the Code of Civil Procedure, may unite several causes of action, where they all arise out of injuries to the person, or where they all arise out of injuries to property, and it is expressly provided in such section that the "causes of action so united must all belong to one only of these classes." It has been held, in construing such code provision, that causes of action for damages to person and property, based upon a forcible trespass as the wrongful cause, could not be united in one action. (*Id.*)
11. **PRIOR ADJUDICATION—FAILURE TO PLEAD DEFENSE—WAIVER OF OBJECTION.**—It is another sufficient answer to the objection that the cause of action for personal injuries is barred by the prior recovery of damages resulting to the plaintiff's automobile from the same negligence herein alleged, that no plea of any prior adjudication is raised in the answer of the defendant. It was incumbent upon the defendant, if intending to rely upon such prior adjudication as a bar to any recovery in this action, to plead that defense in

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his answer, and the objection is waived by his failure so to do. (Id.)

12. **ACTION FOR DAMAGES—COLLISION OF AUTOMOBILES—COMPLAINT FOR INTENTIONAL AND WILLFUL ACT—PREJUDICIAL INSTRUCTION—BURDEN OF PROVING NEGLIGENCE.**—In an action for damages for a collision between plaintiff's and defendants' automobiles, where the complaint of the plaintiff alleged only that the defendants intentionally and willfully ran their automobile upon and against the automobile of the plaintiff, to his alleged damage, and contained no averment as to any act of negligence of the defendants, it was prejudicial error to instruct the jury that the plaintiff's cause of action is based upon the carelessness and negligence of the defendants and that the burden is upon the plaintiff to prove that the alleged damages to his automobile were solely caused by the carelessness and negligence of the defendants. (*Tognazzini v. Freeman*, 468.)
13. **PROOF OF NEGLIGENCE NOT AUTHORIZING RECOVERY—FATAL VARIANCE.**—Under the facts stated in the complaint, no recovery could be had for mere negligence; and if the evidence offered upon the trial in support of the plaintiff's case should show negligence only, there would be a fatal variance between the material allegations of the complaint and the proof. (Id.)
14. **RIGHT OF PLAINTIFF TO INSTRUCTION UPON THEORY OF COMPLAINT.** The complaint in every action should be founded upon a theory, and the plaintiff is entitled to have the jury instructed by the trial court upon the law applicable to the theory upon which the cause of action is founded. (Id.)
15. **ERRONEOUS INSTRUCTION NOT CURED BY CORRECT INSTRUCTION—IRRECONCILABLE CONFLICT.**—The erroneous instruction is not cured by a correct instruction that a person committing a willful, wrongful act must respond in damages, and that if the jury found from the evidence that the defendants willfully and deliberately caused the collision in question, their verdict must be for plaintiff. There is such an irreconcilable conflict between this instruction and the one limiting the cause of action to negligence, that it is impossible to determine which of the two conflicting theories was followed by the jury; and the erroneous instruction must be deemed prejudicial, notwithstanding the correct conflicting instruction. (Id.)
16. **DISTINCTION BETWEEN "NEGLIGENCE" AND "WILLFULNESS."**—Ordinarily, and likewise in the law, as sustained by the great weight of authority, there is a decided and well-defined distinction between mere "negligence" and "willfulness." Negligence is opposed to diligence and signifies the absence of care. It is negative in its nature, implying a failure of duty. The moment a person wills to do an injury, he ceases to be negligent. (Id.)

NEGLIGENCE (Continued).

17. **CONTENTION THAT CASE WAS TRIED ON THEORY OF NEGLIGENCE ALONE NOT SUSTAINED BY RECORD.**—It is held that the contention that both parties tried the case on the theory of negligence alone is not sustained by the record, but that, on the contrary, the record shows that the instructions requested by the plaintiff were expressly framed on the theory that the negligence of the defendants in permitting their automobile to run away was not of itself sufficient to warrant a verdict for plaintiff, and that it could not be rightfully rendered unless it was first found from the evidence that defendants willfully and deliberately caused the collision. (Id.)
18. **BILL OF EXCEPTIONS NOT SUSTAINING INEVITABLE ACCIDENT—SHOWING AS TO PROOF.**—It is held that the bill of exceptions does not sustain the contention that the verdict was based on the theory of inevitable accident because of an instruction on that theory. Where the verdict was general both against the plaintiffs on their cause of action and against the defendants on their cross-complaint, on each of which the evidence was conflicting, and the bill of exceptions shows that there was some evidence to support the contentions both of the plaintiff and of the defendants on their cross-complaint, and in view of the conflicting evidence and contradictory instructions, it is impossible to tell on what theory the verdict was founded. (Id.)
19. **LAW OF CONTRIBUTORY NEGLIGENCE—CHARGE TO JURY.**—The law of contributory negligence has no application to plaintiff's cause of action based solely on the willful and wrongful act of the defendants; and the fact that the court deemed it necessary to charge at all upon that subject in relation to the plaintiff emphasizes the contention that the cause of action stated in the complaint was misunderstood and erroneously misstated to the jury. (Id.)
20. **COLLISION BETWEEN INTERURBAN CARS—INJURY TO MOTORMAN—FAULT OF CONDUCTOR OF COLLIDING CAR.**—An interurban railway company, though not liable under section 1970 of the Civil Code, as it stood prior to the amendment of 1907 thereto, is liable under that amendment for injury to a motorman of an interurban trolley car collided with by the negligence and fault of the conductor of a colliding independent trolley car. (Patton v. Los Angeles Pacific Co., 522.)
21. **CONSTRUCTION OF AMENDMENT—PURPOSE TO EXTEND EMPLOYER'S LIABILITY.**—Section 1970 of the Civil Code as amended in 1907, extending the liability of an employer, for an injury, "when the same results from the wrongful act, neglect or default of . . . a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that

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upon which the employee injured is employed," is to be given a fair and reasonable meaning, and to be liberally construed to effect the purpose of the amendment to extend the liability of the employer. (Id.)

22. **INTENTION OF LEGISLATURE—BROAD SCOPE OF LAW—SEPARATE MECHANICAL DEVICES.**—From the phraseology of the amendment to section 1970 of the Civil Code, it is evident that the legislature intended to make the law broad in its scope, and to preserve the liability of the employer in all cases generally where the mechanical device upon which the injured servant is employed is separate and different from that being operated by the negligent employee. (Id.)
23. **SINGLE INTERURBAN "TROLLEY CAR" INCLUDED IN "RAILROAD TRAIN."**—It is held that under a fair rule of construction, the words "railroad train," as applied to an interurban railway, whose trolley cars combine in their construction both motors for propulsion and seats for the accommodation of passengers, is sufficient to include a single "trolley car" operated independently for the carriage of passengers. In construing statutes, courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition. (Id.)
24. **CODE SECTION NOT VIOLATIVE OF STATE OR FEDERAL CONSTITUTION—EQUAL PROTECTION OF LAWS NOT DENIED.**—It is held that the amendment to the code section extending the employer's liability in specified cases is not in violation of the state or federal constitution, in giving certain citizens privileges not granted to others, or in denying to anyone the equal protection of the laws. The classification made by the statute is not arbitrary, but it comports with the rule that there must be a difference in the situation of the employee from that which exists when both are working on the same machine, which justifies the special protection being extended to one class and withheld from the other. (Id.)
25. **RULE OF PROTECTION—OPERATIVES ON DIFFERENT TRAINS OR CARS.**—The rule of the special protection of one class of operatives especially applies to operatives of a railroad working upon different trains or cars. (Id.)
26. **ELECTRIC CARS—WARNING AT CROSSING—CODE SECTION REGULATING STEAM RAILROADS INAPPLICABLE.**—Section 496 of the Civil Code, which was enacted in 1872, applies to a steam locomotive engine on a railroad, and requires a twenty pound bell or a steam whistle to be attached thereto and rung or sounded at a distance of eighty rods from a railroad crossing and continuously until it is passed, and is inapplicable to a train of electric cars, which had no existence when that section was passed, in respect of which the steel gong or compressed-air whistle are the best and most effective

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devices to give warning of its approach to a crossing. (*Laninger v. San Francisco, Vallejo & Napa Valley R. R. Co.*, 411.)

27. **COLLISION OF AUTOMOBILE WITH ELECTRIC TRAIN—STRIKING OUT PARTS OF COMPLAINT.**—In an action for injuries sustained as the result of a collision of an automobile with an electric train, the court properly struck from the complaint inapplicable matter based on section 486 of the Civil Code, and also evidentiary matter relating to a city ordinance, regulating the movement of trains through the city which it was not necessary to plead. (*Id.*)
28. **CONSTRUCTION OF CITY ORDINANCE REGULATING SPEED AT DISTANCE FROM DRAWBRIDGE.**—A municipal ordinance of the city of Napa, which provides that "no person shall run or propel any railroad car, locomotive hand-car, or any train of cars, or any trolley car in the city of Napa at a greater speed than four miles per hour, within one thousand feet of any drawbridge," is held to mean, under a reasonable construction, "within one thousand feet, when approaching any drawbridge." If the city council intended to limit the speed for two thousand feet in all, on both sides of the drawbridge, without any reason therefor, the ordinance would be void. (*Id.*)
29. **PLAINTIFF AS GUEST OF OWNER OF COLLIDING AUTOMOBILE NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE.**—Where it appears that plaintiff was merely a guest of the owner of the automobile who was driving it when it collided with the electric train at a crossing, having no control over the running of the same, and that the defendant is chargeable with negligence in the mode of running its train, the plaintiff cannot be chargeable with contributory negligence, even if the owner of the automobile was also negligent in attempting to cross rapidly in front of the approaching train, and his negligence contributed to the accident. (*Id.*)
30. **IMPROPER NONSUIT—EVIDENCE OF DEFENDANT'S NEGLIGENCE.**—Upon a motion for nonsuit, all of the evidence for the plaintiff, and all inferences therefrom, must be taken as true; and where plaintiff's evidence tends to show that an ordinance of the city limits the speed of the electric train within the corporate limits to the rate of eight miles per hour, and that its speed was greater than that in passing the crossing, and that the plaintiff violated its common-law duty to give reasonable or any warning of its approach to the crossing, it is held that there is sufficient evidence for the plaintiff to establish defendant's negligence in both respects, and there being no evidence tending to show any contributory negligence of the plaintiff, the nonsuit granted upon plaintiff's evidence cannot be sustained. (*Id.*)
31. **ACTION OF DRIVER OF AUTOMOBILE IN VIEW OF SUDDEN PERIL.**—Although the plaintiff was not responsible as a mere guest of the

NEGLIGENCE (Continued).

owner of the automobile, for his action in driving the same when the collision occurred, yet in considering his evidence for the plaintiff, and in judging his conduct at that time, the situation must be viewed as it then appeared to him—that he heard no bell or warning, that he was approaching the crossing at eight or ten miles an hour, and that, when he suddenly saw the car approaching, he feared that his new tires would not hold, and would slide onto the track in front of the train, and therefore judged it best to rush across—he, being thus suddenly put into peril, without sufficient time to consider all the circumstances, is excusable for omitting some precautions, or making an immediate choice under this disturbing influence. (Id.)

22. **CONCURRING CAUSE OF ACCIDENT—NEGLIGENCE OF DEFENDANT AS PROXIMATE CONTRIBUTORY CAUSE—QUESTIONS FOR JURY.**—Where it is a reasonable inference from plaintiff's evidence that the negligence constituted a proximate contributory cause of the injury to the plaintiff, and that if the negligence of the driver of the automobile, for which plaintiff is not responsible, be regarded as precipitating the disaster, this latter should not be regarded as the sole independent cause, but conjointly with the continuous negligence of the defendant as the concurring cause of the injury, the question of defendant's liability to the plaintiff for negligence should have been submitted to the jury. (Id.)

NEGOTIABLE INSTRUMENTS. See Promissory Note.

NEW TRIAL. See Appeal, 9-11; Fraud, 12, 13; Guaranty, 4.

NOTICE. See Mortgage, 1, 4, 5.

NOVATION. See Estates of Deceased Persons, 5, 6.

OFFICE AND OFFICERS.

1. **JUSTICE OF THE PEACE—SALARY IN FULL COMPENSATION—FEES FOR SOLEMNIZATION OF MARRIAGES—DUTY OF PAYMENT INTO COUNTY TREASURY.**—A justice of the peace of a township in a county of the ninth class, which has a population of sixteen thousand or more, and who, under subdivision 15 of section 4238 of the County Government Act, is entitled to a salary of \$150 per month in full of all compensation in both civil and criminal cases, and which, under sections 4290 and 4292 of that act, is in full compensation for services of every kind and description, is not entitled to retain fees paid to him for the solemnization of marriages not expressly authorized to be retained by law, but is in duty bound to pay the same into the county treasury. (County of San Diego v. Bryan, 460.)

OFFICE AND OFFICERS (Continued).

2. **EXPRESS AUTHORITY OF LAW TO RETAIN FEES ESSENTIAL—RULE OF STRICT CONSTRUCTION.**—In order that any fees allowed by law may be retained, and not paid over into the county treasury, such retention must be expressly authorized by law; and where the enactment in regard thereto admits of two constructions, the rule of strict construction against the claimant and in favor of the county government is applicable. (Id.)
3. **ERROR IN DENYING WRIT OF MANDATE.**—It is held that the superior court erred in denying a peremptory writ of mandate to compel the justice of the peace to perform his duty to pay such fees into the county treasury, and that the judgment must be reversed, with directions to issue such peremptory writ. (Id.)
4. **COUNTY OFFICERS—TENURE OF OFFICE AND QUALIFICATIONS—POWER OF LEGISLATURE.**—The legislature, subject to the provisions of the constitution, may create county offices, prescribe the tenure thereof, and determine the qualifications required to render one eligible to election or appointment to such office. In addition to the usual county officers, the legislature has provided generally in section 55 of the County Government Act, as codified in section 4013 of the Political Code, that they include "such other officers as may be provided by law." (Reed v. Hammond, 442.)
5. **ASSISTANT PROBATION OFFICER UNDER JUVENILE COURT LAW A COUNTY OFFICER.**—The office of an assistant probation officer, appointed by the superior court of the county, under the juvenile court law, is a county officer, whose tenure and salary is fixed by the law, and made chargeable upon and payable out of the county treasury, and whose qualifications and eligibility for appointment are determined by the general law of the state when not fixed by the constitution. (Id.)
6. **NONELIGIBILITY OF WOMEN FOR APPOINTMENT PRIOR TO AMENDMENT OF CONSTITUTION.**—Prior to the amendment of the constitution bestowing the elective franchise upon women, a woman was not eligible to appointment as an assistant probation officer under the juvenile court law, since it has been the uniform policy of the general law, prior to that amendment, that no person is eligible to office who is not an elector, "except when otherwise specially provided," there being no provision in the juvenile court law providing for the appointment of a woman to the county office of assistant probation officer, it apparently being a matter of oversight, since women have, by special laws, been made eligible to certain other offices. (Id.)
7. **CONSTRUCTION OF LAW AS TO ELIGIBILITY TO COUNTY OFFICE—"TIME OF ELECTION"—APPOINTMENT INCLUDED.**—The construction of the law regulating eligibility to a county office, that the officer "must, at the time of his election, be an elector of the county

OFFICE AND OFFICERS (Continued).

wherein the duties of his office are to be exercised," is to be construed as relating generally to the time of his legal choice to fill the county office, whether the statute provides for an election by the people or for a legal appointment thereto, and the same rule of eligibility applies in either case. (Id.)

8. **INELIGIBLE APPOINTMENT OF WOMAN—ERROR IN WRIT OF MANDATE TO AUDITOR—REVERSAL—DESIRABILITY OF WOMAN ASSISTANT—FUTURE INELIGIBILITY REMOVED.**—Since the appointment of a woman as assistant probation officer, in this case, was unauthorized by law, notwithstanding the admitted desirability of the services of a woman as assistant probation officer, and though the difficulty in the statute is now removed by the constitutional amendment making women eligible as electors, yet, as the superior court erred in granting a peremptory writ of mandate to the auditor to pay an unauthorized salary, its judgment must be reversed. (Id.)
9. **FIREMAN'S RELIEF FUND OF SAN FRANCISCO—RIGHT OF WIDOW TO PENSION—MANDAMUS—DEMURRER TO PETITION—DEFAULT OF BOARD—CAUSE OF ACTION.**—Where a peremptory writ of mandate to compel payment of a widow's pension out of the fireman's relief fund of the city and county of San Francisco resulted from an order overruling a demurrer of the Board of Fire Pension Fund Commissioners to the petition for the alternative writ, and the default of the board to answer, it is held that the sole question to be determined, upon appeal from the judgment awarding the peremptory writ, is whether upon the admitted facts stated in the affidavit and petition for the writ a cause of action is stated. (Baker v. Board of Fire Pension Fund Commrs., 433.)
10. **KILLING OF FIREMAN "WHILE IN PERFORMANCE OF DUTY"—SUICIDE WHILE INSANE FROM INJURIES RECEIVED.**—Where the affidavit and petition for the writ of mandate show that the deceased husband of the petitioner was a member of the fire department, and that while in the performance of his duty in driving a hose-wagon he received a broken back and other bodily injuries, by the overturning thereof upon him, and that as the result of such injuries he suffered great pain and anguish, which caused him to become insane, and that while so insane, and because thereof, he killed himself, about two months and a half after such serious injuries, it is held that under these circumstances the fireman was "killed while in the performance of his duty," within the meaning of section 5 of chapter VII, article IX, of the San Francisco charter, and that his widow was entitled to the pension demanded. (Id.)
11. **INJURIES PROXIMATE CAUSE OF DEATH.**—The injuries received by the fireman may justly be said to have been the proximate cause of his death, and to have set in motion a train of events that, without the intervention of any outside and independent cause, re-

OFFICE AND OFFICERS (Continued).

sulted in his death, although his own hand inflicted the wound of which he died, while insane, since the self-inflicted wound was the result of the insanity, which was in turn caused by the injuries, which were thus, in effect, the proximate cause of his death. (Id.)

12. **GENERAL RULE AS TO SUICIDE WHILE INSANE.**—It is a general rule that a suicide committed while insane is not considered a mere death by suicide within the terms of a contract, and that self-destruction by one bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may have been used for that purpose, and was no more his act in the sense of the law than if he had been impelled by an irresistible physical force. (Id.)
13. **COUNTY SHERIFF—ACT CLEARLY INCREASING COMPENSATION OF INCUMBENT—SALARIES OF DEPUTIES—CHANGE OF CLASS—VIOLATION OF CONSTITUTION.**—If upon comparison of an act fixing the original compensation of the sheriff of a county of a specified class, and an act increasing his compensation during his term, by the addition of salaries of an under-sheriff and deputy sheriff, under an increased classification of such county, it clearly appears that the change in compensation effects an increase thereof, then to apply such increase to the incumbent would violate section 9 of article XI of the constitution, forbidding such increase "during his term of office." (Appelstall v. Gary, 385.)
14. **EFFECT OF UNCERTAINTY AS TO INCREASE OF COMPENSATION—CLEAR DECLARATION OF LEGISLATURE TO CONTRARY—CONCLUSIVENESS.**—If, in an act changing the compensation of a county officer during his term, the mode thereof is such that it cannot be determined by a comparison of such act with the former act under which he was elected whether such change does or does not result in an increase of the compensation, a clear declaration by the legislature in the later act that it does not increase the compensation would be conclusive of the fact so declared, and the later act would be applicable to the incumbent when it goes into effect, whether it takes effect after sixty days from its passage or immediately. (Id.)
15. **MERE DECLARATION THAT CHANGING ACT TAKES EFFECT IMMEDIATELY—CONSTRUCTION.**—A mere declaration in the act changing the compensation of the county sheriff during his term of office that "this act shall take effect immediately" cannot be construed as a legislative declaration to the effect that it did not constitute an increase, so as to make it applicable to the incumbent when it goes into effect, notwithstanding some uncertainty as to whether an increase of the compensation can be determined by a comparison of the two acts. In the absence of an express declaration, it is to be in-

OFFICE AND OFFICERS (Continued).

ferred that an increase was contemplated, and that it was intended to apply prospectively only. (Id.)

16. **CHANGING ACT INCLUSIVE OF OTHER COUNTY OFFICERS WHOSE SALARIES COULD NOT BE CHANGED—PROSPECTIVE CONSTRUCTION OF STATUTE.**—Where the act purporting to change the compensation of the sheriff also purports to change the compensation of other county officers whose salaries could not be changed during their terms without violating the constitution, the true construction of the act changing the compensation is to treat all of its provisions alike; and, knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequently to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments, which may or may not have the effect of increasing compensation, were likewise intended to operate only in favor of or against officers to be thereafter elected. (Id.)

See Municipal Corporations, 2.

PARENT AND CHILD.

1. **ACTION BY SECOND HUSBAND OF CHILD'S MOTHER AGAINST ESTATE OF ADOPTING PARENT—AGREEMENT FOR COMPENSATION—PRIMA FACIE CASE—IMPROPER NONSUIT.**—In an action by the second husband of the mother of a child which had been legally adopted by the deceased, after the mother's divorce from its father, and which had been committed to the care of the mother and such second husband under an agreement for compensation, which action was brought for such compensation upon a rejected claim against the adopting parents' estate, and in which the evidence for the plaintiff was sufficient to make a *prima facie* case for recovery, it was error to grant a nonsuit therein at the close of the plaintiff's evidence. (Mitchell v. Brown, 117.)
2. **EFFECT OF LEGAL ADOPTION—TERMINATION OF PARENTAL OBLIGATIONS—LEGAL CONTRACT WITH PARENTS.**—After the legal adoption of a minor child by another person the parental obligations of its natural parents cease to exist, and they are no more legally liable for the maintenance, support and education of such child than would be a perfect stranger. It follows that an adopting parent may contract with the natural parents, or with its mother and her second husband, to take care of, support and educate the child for compensation, as freely and legally as such a contract could be made by the adopting parent with a stranger to the blood of such child. (Id.)
3. **EFFECT OF MOTION FOR NONSUIT—LEGAL VIEW OF EVIDENCE.**—A motion for a nonsuit at the close of the plaintiff's evidence presents to the decision of the court to which it is addressed a question

PARENT AND CHILD (Continued).

of law, pure and simple. It should be denied when there is any evidence to sustain plaintiff's case, without passing upon the question of its sufficiency, or as to whether the court believes it or not. Upon such motion, the material facts which the evidence tends to prove must be assumed to be true; and if the evidence is fairly susceptible of two constructions, the court must take the view most favorable to the plaintiff; and if contradictory evidence has been given, it must be disregarded. (Id.)

4. **APPLICATION OF PRINCIPLES OF EVIDENCE TO NONSUIT.**—It is held that, applying the principles of evidence to the motion for a nonsuit, the evidence for the plaintiff must be taken as showing that the agreement for compensation was with the plaintiff's husband as well as with his wife, the child's mother; that the care of the adopted child cannot be presumed gratuitous; that an explanation of a payment of \$1,100 made to the mother after receiving the adopted child, not connected with compensation therefor, but in consideration of her relinquishment of a claim against a different estate, in which her mother and the adopting parent were interested, must be assumed as true; and that every favorable inference and presumption from the evidence must be taken as true; and that the nonsuit cannot be sustained. (Id.)
5. **REVIEW OF ERRORS IN EVIDENCE.**—Errors in evidence cannot be reviewed upon an appeal from the judgment involving only the motion for a nonsuit, but may be reviewed upon appeal from an order granting a new trial. (Id.)
6. **EVIDENCE OF PAYMENT OF MONEY AFTER CARE OF CHILD ADMISSIBLE ON CROSS-EXAMINATION.**—The court properly allowed evidence on the cross-examination of the plaintiff to show that the \$1,100 had been received from the adopting parent by the mother after she received the care of the child for the purpose of an inference that it was received in payment therefor, though the answer may show a purpose foreign thereto. (Id.)

See Undue Influence.

PARTIES. See Community Property; Corporation, 3; Guaranty, 8, 9; Restraint of Trade; Specific Performance, 4.

PARTITION. See Estoppel.

PARTNERSHIP. See Accounting; Lease, 1, 2.

PLACE OF TRIAL.

1. **VENUE—CHANGE OF PLACE OF TRIAL—RESIDENCE OF DEFENDANT—INSUFFICIENT AFFIDAVIT—PROPER AMENDMENT.**—Where the defend-

PLACE OF TRIAL (Continued).

ant made a proper demand to change the place of trial of an action to the county of his residence, but the affidavit was insufficient in merely stating his residence as of the time of making the affidavit, the court did not abuse its discretion in allowing him to amend the affidavit by stating his residence at the time of the commencement of the action and ever since. (*Jaques v. Owens*, 114.)

2. **POWER OF COURT TO ALLOW AMENDMENT UNDER SECTION 478—LIBERAL CONSTRUCTION—RELATION BACK TO ORIGINAL.**—The court had the power to allow the amendment to the affidavit under section 478 of the Code of Civil Procedure, which is to be liberally construed, with a view to promote justice. The amended affidavit when allowed, related back to the time of the filing of the original affidavit; and it then furnished information upon the ground of the motion for a change of the place of trial, and supplied sufficient evidence to warrant the order granting it. (*Id.*)
3. **PRESENCE OF PARTIES IN COURT AT TIME OF MOTION UPON AMENDED AFFIDAVIT—AMENDED NOTICE NOT REQUIRED.**—The parties being in court when the amended affidavit was allowed, and the motion thereupon was heard, no amended or additional notice of the motion was required. (*Id.*)
4. **FORMAL NOTICE OF MOTION NOT NECESSARY—REGULATION UNDER RULES OF COURT.**—The statute does not require formal notice of the motion to change the place of trial. When the demand and application with demurrer were served and filed, the plaintiff had due notice of the application. Any additional notice would be regulated or determined by the rules of the court. The "motion" is the formal application in court for the order, in its regular course of procedure; and the court, in such regular course, has jurisdiction to hear and determine the motion. (*Id.*)
5. **VENUE—CHANGE OF PLACE OF TRIAL TO RESIDENCE OF DEFENDANT—ERRONEOUS ORDER—INSUFFICIENT AFFIDAVIT OF MERITS.**—An order changing the place of trial to the residence of the defendant is erroneous and must be reversed where the court's ruling is based upon an insufficient affidavit of merits, "that affiant has fully and fairly stated the facts of her case herein to her attorney," by whom she was advised that she had a good and valid defense to the action. Such affidavit in effect stated that she had merely stated her defense and not all of the facts of the case, as required. (*Phillips v. Logan*, 287.)

See Accounting, 2-4; Appeal, 5, 6.

PLEADING.

GENERAL DEMURRER—DEMURRER FOR UNCERTAINTY—JUDGMENT UPON DEMURRER—AMENDMENT NOT ASKED.—Where the court sustains

PLEADING (Continued).

both a general demurrer to the complaint and a demurrer for uncertainty, and rendered judgment upon the demurrer, from which the appeal is taken, and any construction of the pleading in favor of a cause of action would clearly render the complaint uncertain, the conclusion of the trial court was correct, in either point of view, and there having been no request for an amendment of the complaint, the judgment must be affirmed. (*DuBois v. Padgham*, 298.)

See Appeal, 10-12; Attorney at Law, 1, 2; Banks, 6, 7; Brokers, 1, 7; Divorce, 7, 8, 10; Electric Company, 5; Guaranty, 1, 2, 4, 12; Judgment, 9, 10; Mechanic's Lien, 1, 2; Mortgage, 6, 7; Negligence, 1, 4, 9-11; Promissory Note, 1, 10; Restraint of Trade, 2, 3; Sale, 7; Schools, 10, 11; Specific Performance, 11, 12; Vendor and Vendee, 3, 4, 22.

PLEDGE.**ACTION FOR BALANCE DUE ON NOTE—SALE OF COLLATERAL STOCK—**

MARKET VALUE STATED BY PLEDGOR—PRESUMPTION OVERCOME BY FINDING.—In an action for the balance due on a promissory note, after the sale of stock pledged as collateral security therefor, which the payee was authorized to sell in the market after the maturity of the note without demand, advertisement or notice, the plaintiff being authorized to purchase at the sale, it is held that any presumption that the stock was sold at the market value expressed by the owner when the collateral was deposited is overcome by the finding that a sale for a less sum was *bona fide*, and was for an adequate and highest obtainable price. (*Wagy v. Atkinson*, 178.)

PRACTICE. See Appeal; Evidence; Execution; Findings; Instructions; Intervention; Judgment; Jurisdiction; Justice's Court; Mandamus; New Trial; Parties; Place of Trial; Pleading; Prohibition.

PROBATE LAW. See Estates of Deceased Persons.

PROBATION. See Criminal Law, 4-10.

PROHIBITION.

1. **WRIT OF PROHIBITION—CHARGE BEFORE ONE JUSTICE OF THE PEACE OF MISDEMEANOR OF ANOTHER—REFUSAL TO ALLOW INSPECTION OF DOCKET.**—The writ of prohibition will not lie to restrain one justice of the peace from trying another justice of the peace for misdemeanor in refusing to permit an inspection and examination of his docket during office hours, since justices of the peace have jurisdiction of misdemeanors, and the affidavit filed before such other justice was an attempt to set up facts constituting a misdemeanor, the suffi-

PROHIBITION (Continued).

ciency of which to show a misdemeanor he had jurisdiction to pass upon and determine, rightfully or wrongfully, and the superior court erred in granting the writ. (*Cassidy v. Cannon*, 426.)

2. **OFFICE OF WRIT OF PROHIBITION.**—The writ of prohibition is not a writ of error to determine the correctness of the decision of an inferior tribunal, but it only lies where a public officer is proceeding without or in excess of jurisdiction, and no plain, speedy and adequate remedy at law exists. (*Id.*)
3. **PUBLIC OFFENSE NOT STATED—REMEDY BY HABEAS CORPUS.**—If, as claimed by the petitioner for the writ of prohibition, no facts are averred constituting a public offense, he has ample relief, in case he is found guilty, through a writ of *habeas corpus*. (*Id.*)
4. **REFUSAL OF OFFICER TO PERFORM A PUBLIC DUTY—REMEDIES.**—The refusal of an officer to perform a public duty amounts to an omission in that regard, and is a misdemeanor under section 176 of the Penal Code, or he may be proceeded against under section 772 of the Penal Code. (Opinion denying rehearing by appellate court.) (*Id.*)
5. **OPINION ON PETITION FOR REHEARING IN SUPREME COURT—LIMITATION OF DENIAL.**—The supreme court, on denial of a rehearing, bases its order on the last above decision, which shows sufficient ground for reversal of the judgment, and no opinion is expressed as to the other doctrines stated in the original opinion. (*Id.*)

See *Juvenile Court*, 3; *State Lands*, 3.

PROMISSORY NOTE.

1. **ACTION ON NOTES—EVIDENCE—SPECIAL DEFENSE—CONDITIONS INDORSED—IMMATERIAL VARIANCE—DEFENDANT NOT MISLED.**—Where two notes sued upon were on their face unconditional promises of the defendant to pay the principal sum, six months after date with interest, and their execution and delivery were not denied, but defendant had pleaded as a defense that each of them "was a conditional note, with certain conditions indorsed on the back thereof, which conditions have not been complied with," and the face of such note was introduced in evidence, the defendant cannot insist that there was a material variance on plaintiff's part in not offering in evidence the indorsements, since the defendant was not misled thereby to his prejudice, in maintaining his defense. (*Ostrom v. Woodbury*, 142.)
2. **EFFECT OF SPECIAL DEFENSE—AID OF COMPLAINT.**—The effect of the pleading of the special defenses to each of such notes was to aid the complaint in those particulars in which it is claimed that the complaint was defective in not pleading the notes in full, and to supply the omissions objected to. (*Id.*)

PROMISSORY NOTE (Continued).

3. **INDORSEMENTS OF CONDITIONS OF PURCHASE OF MINING STOCK—PROOF OF NONACCEPTANCE—SUPPORT OF FINDING OF SURPLUSAGE.**—Where the indorsements on each of the two notes signed by the defendant were to the effect that, "this note is given to protect" the payee named "from loss on account of the purchase of 1,000 shares of Red Star Gold Mining Co.'s Stock," and the payee "has the option during the life of this note of surrendering this note and keeping the 1,000 shares of stock or surrendering the stock and receiving payment on the note," it is held that a finding that such indorsements were "surplusage" is sustained by proof that the payee did not purchase or accept the shares of stock mentioned in payment of either of the notes. (Id.)
4. **LEGAL EFFECT OF INDORSEMENTS—OFFER OR OPTION TO ACCEPT SHARES IN PAYMENT IN LIEU OF COIN—EFFECT OF NOTES NOT CHANGED.**—Viewing the indorsements as having been assented to by the payees, the same can only be considered as constituting in legal effect a mere offer or option tendered by the maker to the payees to accept the number of shares of mining stock mentioned therein in payment of the notes in lieu of their payment in gold coin as called for by the notes. The writing indorsed could no more affect or change the nature of the face of the notes than if it had been committed to different pieces of paper unconnected with the notes. (Id.)
5. **ELECTION OF PAYEE TO ENFORCE NOTES—REJECTION OF OPTION—NUGATORY EFFECT UPON INDORSEMENTS.**—The election of the payees to enforce payment of the notes according to the face thereof would, without regard to the position of the writing, amount to a rejection of the option, and if the note and indorsements are taken together, upon the refusal of the payees to take the stock, the notes would immediately become unconditional promises according to their tenor, and the written indorsements became nugatory and of no effect as soon as the action upon the notes was commenced. (Id.)
6. **ABSENCE OF CONDITION PRECEDENT TO ACTION ON NOTES.**—Where the undisputed testimony shows that the payees had never received any shares of stock in the mining corporation, it appears that they had nothing to surrender as a condition precedent to their action upon the notes, which action of itself operated to surrender the bare right of option to take or acquire the stock. (Id.)
7. **PROMISSORY NOTE—CONSIDERATION—RELEASE OF MAKER AS SURETY ON CONTRACTOR'S BOND BY OWNER—LIENS—SUBSEQUENT SETTLEMENT.**—Where the owner of a building released the defendant from liability on the contractor's bond in consideration of his note given at the time when there were mechanics' liens under the contract, aggregating nearly three times the amount of the note, it was supported

PROMISSORY NOTE (Continued).

by a sufficient consideration, which was not affected by the subsequent fact that a settlement effected by the owner of the building with the lien claimants enabled the owner to secure the completion of the building at the original contract price. (*San Francisco Mercantile Union v. Muller*, 174.)

8. **COMPROMISE OF DOUBTFUL CLAIM—SUFFICIENT CONSIDERATION.**—The compromise of a doubtful claim is a valid consideration for a promise or a new contract; and where at the time of the giving of the promissory note sued upon, in consideration of a release of liability upon the bond, it was uncertain what the defendant's liability upon the bond might be, the note was given and received in compromise of a doubtful claim, and is supported by a sufficient consideration. (*Id.*)
9. **FINDING AGAINST CONSIDERATION OF NOTE UNSUPPORTED.**—It is held that the finding of the court, that the defendant as maker of the note received no consideration therefor, is unsupported by the evidence. (*Id.*)
10. **CLAIM OF FRAUD IN NOTE—DEFENSE NOT PLEADED.**—In order to support the claim that the note was procured by fraud, one relying thereon must specially plead the fraud, and it is a sufficient answer to such claim that no such defense was pleaded. (*Id.*)
11. **BOND NOT ORIGINALLY VOID—COMMON-LAW BOND.**—The claim that the bond was originally void as one given under section 1203 of the Code of Civil Procedure is held not supported by the record, but that the bond is clearly a valid common-law bond given for the protection of the owner. (*Id.*)

See Attorney at Law; Corporation, 9-18; Incompetent Persons; Mortgage, 1, 2.

PUBLIC LANDS. See Taxation.

PUBLIC OFFICERS. See Office and Officers.

PUBLIC POLICY. See Fraud, 1.

PUBLIC SCHOOLS. See Schools.

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—DEED OF GIFT TO PLAINTIFF—DELIVERY—PRESUMPTION—SUPPORT OF FINDING AND JUDGMENT.**—Where the plaintiff in an action to quiet title produces a deed of gift to her from the defendant, she has the right to rely upon the presumption of its delivery from the fact of her possession, unless overcome by counter-evidence; but where in addition to her own testimony as to

QUIETING TITLE (Continued).

its delivery, the presumption was also strongly fortified by the positive testimony of a number of other witnesses, a finding of such delivery is amply supported by the evidence, and is sufficient to sustain the judgment rendered in her favor. (*Bohn v. Gunther*, 191.)

2. **JUDGMENT FOR LIFE ESTATE IN DEFENDANT WITHIN JURISDICTION—TITLE IN CONTROVERSY—PLEADINGS.**—Where, in the action to quiet title, the title was in controversy, and each party sought to quiet title, and to cancel a deed, and there is sufficient evidence, including the testimony of the plaintiff and defendant, corroborated by correspondence, as well as by the terms of the deed of gift, making it evident that it was distinctly understood that defendant was to have the use and enjoyment of the property during his life, and that plaintiff was to have the fee subject to such life estate, the court had jurisdiction in equity to determine the true estates of the respective parties, and to find and adjudge the title in plaintiff, subject to such life estate, though not specially referred to in the pleadings. (*Id.*)
3. **WHOLE TITLE IN CONTROVERSY INCLUSIVE OF PART.**—Since the whole of the title in controversy includes a part thereof, it cannot be said that the finding of a life estate in the defendant is entirely outside of the matter alleged in the pleadings of the respective parties in the action to quiet title as framed therein. (*Id.*)
4. **JUST AND EQUITABLE JUDGMENT.**—It is held that, accepting the facts found, as must be done under the established rule applicable to appellate tribunals, the judgment of the lower court as rendered for each party is not only amply sustained, but is eminently just and equitable. (*Id.*)

See Judgment, 4; Taxation, 1, 3; Title to Land.

RAILROAD. See Negligence, 20-32.

RAPE. See Criminal Law, 91-107.

RECEIVER. See Corporation, 3; Mortgage, 19, 20.

RECORDATION. See Mortgage, 5-8, 15, 16.

RESTRAINT OF TRADE.

1. **CONTRACT BETWEEN PARTNERS UPON DISSOLUTION—LIMITATION TO CITY—CONSTRUCTION OF CODE.**—Under section 1673 of the Civil Code, every contract whereby one is restrained from exercising a lawful business is void, unless made pursuant to sections 1674 and 1675 of that code. While under section 1674 of the Civil Code one other than a partner may, where he sells the goodwill of a business, make a valid contract to refrain from carrying on a business similar

RESTRAINT OF TRADE (Continued).

to that sold within a specified county or city, the territorial limits as to which a partner may, by contract, restrict himself is under section 1675 of that code limited to a city or town. (*DuBois v. Padgham*, 298.)

2. **INSUFFICIENT COMPLAINT AGAINST RETIRING PARTNER.**—A complaint against a retiring partner who sold the goodwill of the business of publishing a directory in a specified city, and in soliciting contracts for advertising therefor throughout the county, which alleges a breach by entering into the publication of a directory in said county and in soliciting advertising therefor, which does not state that he published a directory for the same city, or sold any directory therein or solicited advertising therein, states no cause of action under section 1675 of the Civil Code for breach of the contract for sale of the goodwill of the partnership in said city. (*Id.*)
3. **CONSTRUCTION OF PLEADING AGAINST PLEADER.**—A pleading must be construed most strongly against the pleader, and the general allegation that defendant "entered into the publication of a directory in said Orange county, and solicited advertising therefor, and in the same field and territory where plaintiffs were engaged in a similar business, and were exercising the goodwill purchased from said defendant as aforesaid," is wholly consistent with the fact that such publication was made and advertising solicited in other parts of the county than the city where plaintiffs' directory is published; and so construed it fails to state a cause of action. (*Id.*)

ROBBERY. See Criminal Law, 3, 108, 109.

RULES OF COURT. See Justice's Court, 1.

SALE.

1. **SALE OF BALED HAY IN BARNs—PRICE PER TON—PART PAYMENT—TITLE PASSED—LOSS BY FLOOD—RISK OF BUYER.**—A sale of all the baled hay in two barns of the plaintiff to the defendants at a fixed price per ton, which were separated from all other hay in the barns and which were exhibited and fully identified, and upon which defendants paid \$400, and was to pay the residue of the price per ton in installments upon delivery from time to time, passed a present title to the defendants to all of the baled hay; and where, without the fault of the seller, after delivery and payment for a number of installments the undelivered bales were damaged as the result of a flood, such bales were at the risk of the buyer, and the loss must fall upon him. (*Fiddymont v. Johnson*, 839.)
2. **CODE PROVISION AS TO PASSAGE OF TITLE TO BUYER.**—Under section 1140 of the Civil Code "The title to personal property sold or

SALE (Continued).

exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." (Id.)

3. **AGREEMENT UPON PRESENT TRANSFER—QUESTION OF FACT.**—From the evidence presented to the court, it was a question of fact for the court to determine as to whether or not the parties had agreed upon a present transfer. Where the intention of the parties is not clear, but must be determined from the facts and circumstances of the case, it is a question of fact for the jury or the trial judge. (Id.)
4. **WEIGHING AND MEASURING TO ASCERTAIN FINAL PRICE—DELIVERY AT POINT OF SHIPMENT.**—If the goods sold are identified, and the parties agree upon a present transfer, it does not matter that weighing or measuring is necessary to ascertain the price to be finally paid; neither is the fact that the seller has agreed to haul and deliver the goods at some point of shipment necessarily controlling. (Id.)
5. **SALE OF GROWING OLIVE CROP—LIMITED PURCHASE OF "FOUR TONS OF OIL OLIVES"—DESIGNATION BY PURCHASER OF RESIDUE AS "PICKLING OLIVES"—WARRANTY OF QUALITY NOT IMPLIED.**—Under a contract for the sale of an olive crop growing upon the trees of the vendor, not sufficiently ripe for gathering, where a smaller price per ton was expressly limited to "four tons of oil olives," and the residue of the crop was designated by the purchaser as "pickling olives," at a higher price per ton, all olives to be carefully picked by the purchaser and paid for as agreed, after delivery, in the absence of an express warranty that the residue were "pickling olives," none is implied from such designation, and any loss of quality of part of the residue by frost and wind, before gathering, rendering part thereof unmerchantable, otherwise than as "oil olives," must fall upon the purchaser. (Carpenter v. Grogan, 505.)
6. **ACTION FOR MONEY HAD AND RECEIVED—CONTRACT TO PURCHASE CIGAR STORE—ASSIGNMENT NOT EFFECTED—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE.**—In an action for money had and received, which had been paid under a contract to purchase a cigar store, upon the theory that no sale had been effected, where plaintiff's evidence was that the money was paid with the guaranty that if the cigar stock did not amount to \$700, no sale was to be effected, that no assignment was in fact made, that an inventory of the stock was agreed upon and was refused upon demand, and that the contract was rescinded, but the evidence of defendant was conflicting as to the terms of the contract, and that no inventory was agreed upon or needed, it is held that the findings for plaintiff, upon the conflicting evidence, cannot be disturbed upon appeal. (Stoeckle v. Karr, 428.)

SALE (Continued).

7. **ACTION FOR DAMAGES—BREACH OF CONTRACT TO PURCHASE MERCHANDISE SHIPPED—RESCISSION—INSUFFICIENT COMPLAINT—VALUE NOT STATED.**—A complaint in an action to recover damages for breach of a contract to receive and pay for a carload of merchandise shipped by the plaintiff from its factory at Steubenville, Ohio, to the order of the defendant at Bakersfield, California, which was rescinded by plaintiff for such breach, should allege that such merchandise was of no greater value in the market than the agreed purchase price when the contract was rescinded, in order to recover as damages moneys paid out by the vendor on account of the breach, and where it states no value of the property at all, it fails to state a cause of action for any damages, and the court erred in overruling a general demurrer thereto. (*Pool v. Phoenix Refining & Mfg. Co.*, 227.)
8. **AGREEMENT TO PAY FREIGHT CHARGES NOT SEVERABLE FROM PURCHASE PRICE TO SUPPORT ACTION.**—The agreement to pay the freight charges in addition to the price of the merchandise at the factory, upon its shipment to this state, became a part of the purchase price in this state, and is not severable therefrom to sustain the action for breach upon rescission of the contract of purchase in this state, without an averment of the value of the merchandise at that time, which might have been worth much more than the price then agreed to be paid for it in the absence of such averment. (*Id.*)
9. **ACTION FOR PRICE OF STEAMER SHAFT FURNISHED—SUFFICIENCY OF SHAFT—CONFLICTING EVIDENCE—RETENTION AND USE—SUPPORT OF VERDICT.**—In an action for the agreed price of a steel shaft completely equipped for use in defendant's steamer, where sufficiency of the shaft for the purpose for which it was intended was in controversy, and defendant claimed an absolute agreement of plaintiff to furnish a better shaft, and the evidence upon those questions was substantially conflicting, but it appeared without conflict that defendant had retained and worked the original shaft for sixteen months up to the time of trial, without indications of weakness therein, the verdict for plaintiff for the agreed price was sufficiently supported. (*Stockton Iron Works v. Walters*, 373.)
10. **VERDICT FOR AGREED PRICE "WITHOUT INTEREST"—INTEREST WAIVED BY PLAINTIFF—INSTRUCTION BY CONSENT OF PARTIES—AMENDMENT IN COURT—APPELLANT NOT INJURED.**—Where the jury after retirement and deliberation had reached a verdict for the plaintiff for the agreed price, and asked for an instruction as to whether they could "cut out the interest," whereupon the plaintiff expressly waived the interest, and both parties agreed to an instruction that they could dispense with the interest, and the court asked them if they wished to retire, to which the foreman replied that he thought it unnecessary, and the jury immediately amended their verdict by adding to the price agreed upon the words, "without interest," and

SALE (Continued).

handed in their verdict ~~so~~ amended in open court, and upon being polled, every juror agreed that it was his verdict, it does not appear that appellant was injured by such amendment in his favor in open court. (Id.)

11. **RULINGS UPON EVIDENCE—FURNISHING OF SHAFT—STATEMENTS IN ABSENCE OF DEFENDANT—PAROL EVIDENCE TO VARY CONTRACT.**—The court properly ruled that it was immaterial that plaintiff contracted with another company to forge the shaft furnished; that statements out of the presence of the defendant could not bind him; and that the terms of the written contract could not be waived by parol evidence. (Id.)

12. **RULINGS NOT PREJUDICIAL.**—It is held that no rulings of the court upon evidence were prejudicial, and that the evidence which went to the jury in its entirety fairly presented the theories of the respective parties; that defendant was given every reasonable opportunity to present every material fact at his command, and that it does not appear that plaintiff was permitted to sustain its case by evidence not legally admissible or, at least, which was erroneously admitted to defendant's prejudice. (Id.)

13. **PROPER INSTRUCTIONS.**—It is held that the instructions taken as a whole, fairly and correctly presented all of the issues raised by the pleadings. (Id.)

See Fraud, 8, 9.

SAN FRANCISCO, CITY AND COUNTY OF. See Municipal Corporations, 3; Office and Officers, 9-12.

SCHOOLS.

1. **PUBLIC SCHOOLS—ACT FORBIDDING SECRET FRATERNITIES—POWER OF BOARD TO EXPEL SCHOLAR—POLICY OF LAW—CONSTITUTIONALITY.**—Under the act of 1909 (Stats. 1909, p. 332), to prevent the formation and prohibit the existence of secret fraternities in any elementary or secondary school in this state, and requiring boards of school trustees and boards of education to enforce the act, with power to expel any scholar who violates the law, upon appeal from a judgment refusing to reinstate an expelled scholar who has violated the act, the policy of the legislature in enacting it cannot be considered; but the only question to be determined is whether or not the legislature, in passing it, acted within the limits imposed upon it by the constitution. (Bradford v. Board of Education, 19.)
2. **PROVISIONS OF CONSTITUTION NOT VIOLATED—SPECIAL IMMUNITIES—LOCAL OR SPECIAL LAWS.**—The act of 1909 does not violate or contravene the provisions of section 21 of article I of the constitu-

SCHOOLS (Continued).

tion that no citizen or class of citizens shall be granted privileges or immunities which upon the same terms are not granted to all citizens, because immunity is granted to normal schools, and special immunity to all pupils who join certain specified fraternities not connected with the public schools. Nor is such act local or special legislation in violating section 25 of article IV, forbidding the legislature to pass local or special laws "granting to any corporation, association or individual any special or exclusive right, privilege or immunity." (Id.)

3. **GENERAL LAW—ACT APPLYING UNIFORMLY TO PERSONS OF A PARTICULAR CLASS.**—An act applying uniformly to all citizens or persons of a particular class is a general law, and not special or local, either in violation of section 21 of article I or of section 25 of article IV of the constitution, if such particular class is founded upon some natural, intrinsic, or constitutional distinction differentiating its members from the general body from which the class is selected. It is held that the younger and more immature pupils of the public schools may quite properly form a particular class, in distinction from normal schools or colleges, and that the act applies equally to all of such particular class. (Id.)
4. **QUESTION FOR LEGISLATURE—PRESUMPTION—PROVINCE OF COURTS.**—The question whether the individuals affected by a law do intrinsically constitute a particular class is primarily one for the legislative department of the state, and when such legislative classification is attacked in the courts, every presumption is in favor of the legislative act; and if sufficient reasons may be assumed therefor, the act will be upheld; and to warrant a court in adjudging it void, as special legislation, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference or making a discrimination. (Id.)
5. **EXCEPTION ALLOWING PUPILS TO JOIN OUTSIDE FRATERNAL ORGANIZATIONS NOT AN INVALID DISCRIMINATION.**—The exception in the statute allowing pupils in the public schools to become members of such outside associations, not connected with the public schools, as the Native Sons of the Golden West, Native Daughters of the Golden West, or other kindred outside organizations, is not an invalid discrimination, since no such deleterious effects could follow such membership as in the case of secret fraternities or sororities existing wholly among the pupils as forbidden by law. (Id.)
6. **TITLE OF ACT—PROHIBITION OF "SECRET OATH-BOUND FRATERNITIES."**—The title of the act as "An act to prohibit the formation and existence of secret oath-bound fraternities in the public schools" is not rendered invalid under section 24 of article IV of the constitution, because the words "sororities or clubs," used in the body of the act, are not expressed in its title. The word "fraternities"

SCHOOLS (Continued).

used in the title, in its popular sense, includes organizations of both sexes, and expresses "sororities or clubs," and the body of the act is not broader than its title. (Id.)

7. **ACT NOT VIOLATIVE OF FEDERAL CONSTITUTION.**—The act of 1909 does not violate that provision of the federal constitution which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." That constitutional provision does not include rights and privileges granted to citizens which depend solely upon the law of a state. (Id.)
8. **SYSTEM OF PUBLIC SCHOOLS, A STATE INSTITUTION, NOT WITHIN FEDERAL GUARANTY.**—The system of public schools of this state is a state institution, and is subject to the exclusive control of the constitutional authorities of the state, and the right of attending a public school, though capable of enforcement at law, if wrongfully infringed, is not such a right as is guaranteed by such provision of the federal constitution. (Id.)
9. **SCHOOL BUILDING—POWER OF BOARD OF TRUSTEES—CONDITIONS OF CONTRACT TO BUILD—ACCEPTANCE OF PLANS—APPROVAL OF BOND—CONSTRUCTION OF STATUTE.**—It is held that under a fair construction of the act of 1872 [Stats. of 1872, p. 925] providing for the erection of public school buildings, it empowers the board of trustees of a school district to accept the plans and specifications of an architect for a school building only upon the condition of the execution and approval of the required bond, and both the acceptance of the plans and specifications and the execution and approval of such bond are essential conditions of a valid contract for the erection of such school building. (*Burki v. Pleasanton School District of Alameda County*, 493.)
10. **COMPLAINT OF ARCHITECT FOR DAMAGES FOR BREACH OF CONTRACT—CAUSE OF ACTION NONEXISTENT.**—A complaint by the architect for damages for alleged breach of a contract to erect the public school building, which merely alleges that the plans and specifications submitted by him therefor were accepted by the board of trustees of the school district, and that he prepared and delivered a bond in the required sum, which shows that it was delivered long after its date, contrary to the statute, and avers that the bond was disapproved and rejected by the board of trustees, and that they notified plaintiff that they had rescinded their action and had advertised for new bids, without further averment, shows on its face that the alleged contract sued upon never existed, and never could exist, and a general demurrer thereto was properly sustained, without leave to amend. (Id.)
11. **FAILURE TO GIVE STATUTORY BOND NOT MATTER OF DEFENSE.**—Where the plaintiff has assumed to set forth all of the facts, and

SCHOOLS (Continued).

that the alleged statutory bond set forth was rejected for the reason appearing upon the face of the complaint, that it did not comply with the statute, and that the bond was rejected on that ground, besides for a different reason, it cannot be tenably claimed that the failure to give the statutory bond should be pleaded as a defense, and cannot be taken advantage of by demurrer. (Id.)

See Employer and Employee.

SEDUCTION. See Criminal Law, 110, 111.

SPECIFIC PERFORMANCE.

1. **CONTRACT TO ADOPT CHILD AS HEIR—EQUITABLE OWNERSHIP OF ESTATE.**—Where the parents of a daughter four years old agreed with its childless widowed aunt to surrender to her all control of the child, under a written contract that, in consideration thereof, she would adopt, rear and educate it as her own child and make it her heir at law, so that it would inherit her property at her death, and the parents performed all on their part, and the child became and remained in her aunt's home as her daughter, and performed all the duties of a daughter in her home, until married, after which she still held her relations toward the aunt as her mother, until her death, about twenty-four years from the date of the contract, a court of equity will enforce specific performance of the contract, as against collateral heirs, and decree her to be the equitable owner of the estate as against them. (*Furman v. Craine*, 41.)
2. **SPECIAL GROUND FOR RELIEF IN EQUITY—ADEQUATE COMPENSATION NOT ESTIMABLE.**—The surrender of their child on the part of the parents, the presumed detriment to the plaintiff from the severing of the paternal ties, and the love, obedience and companionship given to the aunt, followed by the relationship assumed between them, consisting of numerous and nameless delicate services and attentions, cannot be measured in gold. The law furnishes no standard by which the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract. (Id.)
3. **PRESENTATION OF CLAIM AGAINST ESTATE NOT REQUIRED—ENFORCEMENT OF EQUITABLE OWNERSHIP—TRANSFER OF TITLE.**—It was not necessary that the complaint should show that, before the filing thereof, the plaintiff presented a demand or claim for the property to the administrator. Sections 1493 and 1500 of the Code of Civil Procedure, as to the presentation of claims, have no reference to an action for specific performance, in which it is not claimed that the estate is indebted to plaintiff, or that she holds any claim payable out of the estate in the course of administration; but that plaintiff is the equitable owner of the whole residue of the estate,

SPECIFIC PERFORMANCE (Continued).

- and as such entitled to a conveyance from those having the legal title. (Id.)
4. **ADMINISTRATOR AS A PARTY—ORDINARY RULE—INJUNCTION.**—Ordinarily, it is not necessary or proper that the administrator should be a party to such an action; but it is held that, in this case, the administrator was a proper party to the present action, in order to enjoin him from paying or delivering any part of the estate to the collateral heirs, who are defendants to the action. (Id.)
5. **ACCRUAL OF CAUSE OF ACTION—DEATH OF AUNT—ABSENCE OF LACHES.**—The cause of action, involved in the action for specific performance of the contract of heirship, did not accrue until the date of the death of the adopting aunt. The adoption was not the cause of action, but merely the means of obtaining the property left at her death. Where the action was brought within two years from the date of her death, and in time to enforce specific performance of the contract of heirship before distribution of the estate, the action is not barred by limitation nor by laches. Mere delay for a period of time less than the statute of limitations does not constitute laches. (Id.)
6. **LOSS OF WRITTEN CONTRACT—MUTILATED COPY—PAROL EVIDENCE OF CONTENTS.**—Where the agreement between the aunt and plaintiff's parents was executed in duplicate, and both copies were left with the aunt, and at the time of her death only one mutilated copy was found, disclosing the signatures of the parties and the names of the witnesses, but containing little of the substance of the agreement, and the other copy could not be found after diligent search, the evidence was sufficient to establish the loss and to admit parol evidence of its contents. (Id.)
7. **COMPETENCY OF WITNESS TO CONTENTS—PARENTS OF PLAINTIFF—ADMINISTRATOR AS PARTY.**—The cause of action not being upon a claim against the estate of a deceased person, within subdivision 3 of section 1880 of the Code of Civil Procedure, the parents of the plaintiff, the father of whom was the administrator of the estate of the deceased aunt, not a necessary party to the action, were competent to testify to the contents of the lost and mutilated instrument. (Id.)
8. **PROPER TESTIMONY OF PLAINTIFF.**—The plaintiff was properly permitted to show that she performed the obligations and duties devolving upon her as the daughter of the deceased, not as a mere stranger, but in reliance upon the status of mother and daughter which she believed to exist, and that her belief was justified by the conduct and representations made to her by the deceased. (Id.)
9. **OTHER COMPETENT TESTIMONY—CONVERSATIONS, CONDUCT AND ACTIONS OF AUNT—CONSTRUCTION OF CONTRACT.**—It was proper to prove by witnesses, including the depositions of witnesses properly

SPECIFIC PERFORMANCE (Continued).

taken, conversations, conduct and actions on the part of the aunt, which tended to show that she construed the agreement as creating the relation between her and the plaintiff of mother and child by adoption. (Id.)

10. **ANSWER PROPERLY STRICKEN OUT—ALLEGED FRAUD OF PLAINTIFF AND HER FATHER—FABRICATION OF TESTIMONY.**—Where the answer properly took issue upon the alleged agreement, an averment therein that plaintiff and her father had conspired together in fabricating testimony to prove the existence of the alleged contract, knowing that no such contract had been made, was properly stricken out. (Id.)
11. **ACTION TO QUIET TITLE TO TIMBER LANDS—OPTION TO PURCHASE—SPECIFIC PERFORMANCE—CROSS-COMPLAINT—INDUCEMENT FOR RAILROAD ROUTE—BUILDING NOT A CONDITION.**—In an action to quiet title to timber lands, in which defendant set up an irrevocable option to purchase the same, the specific performance of which was sought by cross-complaint, which alleged that defendant and his associates proposed to construct a railroad, the route for which depended largely upon purchases of timber lands, which plaintiffs well knew, and that the inducement and consideration moving plaintiffs to enter into said contract was the encouragement and inducement of the building of said railroad from Ukiah to Willits, in preference to other routes, it is held that the cross-complaint cannot be rationally interpreted to justify the inference that the actual building of such railroad constituted any part of the consideration moving plaintiffs to grant the option, or imposing the same as a condition precedent to defendant's right to a conveyance. (McCowen v. Pew, 802.)
12. **SUFFICIENCY OF CROSS-COMPLAINT TO STATE CAUSE OF ACTION—DECISION UPON LAST APPEAL—LAW OF CASE—DIFFERENT REASON IMMATERIAL.**—The decision upon the last appeal that the cross-complaint of the defendant stated facts sufficient to constitute a cause of action is the law of the case as to its sufficiency upon the present appeal. It is immaterial that the question arose upon the last appeal upon the refusal of the trial court to admit any evidence in support thereof, while its sufficiency to state a cause of action is here urged for a different reason. The law does not countenance a piecemeal method of attacking a pleading, which is adjudged valid by the law of the case. (Id.)
13. **ABSENCE OF PROMISE AS CONSIDERATION OF OPTION—CONDITIONAL BENEFIT OF PURCHASERS.**—Whatever inducement may have moved the plaintiffs in granting the option to defendant, it is held that no agreement or promise was made by defendant, in consideration of the option, to select any particular route, or that defendant or his associates undertook to do anything in consideration thereof; but that they merely contemplated that any future pur-

SPECIFIC PERFORMANCE (Continued).

chase of the timber lands, if paid for at full value under the option, would be an inducement for freight to be carried by them over one of four contemplated routes, for their benefit. (Id.)

14. **ALLEGED VARIANCE BETWEEN OPTION AND ACCEPTANCE IN FINDINGS FOLLOWING CROSS-COMPLAINT—LAW OF CASE.**—The contention of plaintiffs that the findings disclose a variance between the option granted by the plaintiffs and the acceptance by the defendant, and do not support the judgment, is untenable, where it appears that the finding objected to in this particular substantially follows the averments of the cross-complaint, the sufficiency of which has become the law of the case whether under the decision of the supreme court upon the last appeal or under the decision rendered by the same court upon a first appeal thereto, which decided the point which is here made. (Id.)

15. **TIMBER CUT BY VENDORS DURING LIFE OF OPTION—ACCEPTANCE OF ORIGINAL OPTION—COMPENSATION—EFFECT OF ASSENT BY VENDEE.**—Where the option was of the right to purchase eleven hundred and sixty acres of land at the rate of \$15 per acre within twelve months, and during the life of the option the vendors cut a large amount of timber from the land, and within the time limited defendant gave notice of the acceptance of the option according to its terms, but demanded compensation for the depreciation in value by the cutting of the timber, to which plaintiffs did not object but assented thereto in writing, they thereby distinctly recognized that the acceptance by defendant was of the identical option which they had granted to him, and which they agreed to make good by compensation. (Id.)

16. **RULE OF PART PERFORMANCE WITH COMPENSATION UPON SPECIFIC PERFORMANCE—REDUCTION OF PRICE NOT INVOLVED.**—Where the vendor through his own fault is unable substantially to perform his whole contract, the vendee may, at his election, have specific performance in equity to the extent of the vendor's ability to perform, with compensation for the deficiency. This rule of equity is also embodied in section 3386 of the Civil Code. The rule of compensation does not involve a reduction of the price agreed to be paid, its sole object being to fill up the measure of value for the price agreed, which has been diminished by the vendor's fault. (Id.)

17. **WAIVER AND ESTOPPEL OF VENDORS.**—The plaintiffs, as vendors, having expressly acquiesced in the acceptance of the option granted by them to defendant, and treated and recognized it as an acceptance of the precise option which they granted to him, they thus waived any objection to the acceptance on the ground that it varied from the terms of the option; and they are es-

SPECIFIC PERFORMANCE (Continued).

topped to take advantage of their own wrong in deliberately changing the value of the property purchased by their unauthorized acts during the life of the option. (Id.)

18. **CONSIDERATION FOR OPTION—MERGES IN AGREEMENT.**—It is unnecessary to inquire whether a finding as to the original consideration for the option is or is not supported, since the option as an option agreement became *functus officio* when it was accepted by the defendant according to its terms during the existence of the option which had not been previously revoked, which acceptance was acquiesced in by the plaintiffs, making it a binding contract between the parties. (Id.)
19. **CONTRACT TO SELL TIMBER LAND—DEDUCTION FOR TIMBER CUT—DISCRETION AS TO INTEREST—CONSTRUCTION OF CODE.**—In an action for specific performance of a contract to sell timber land, where an allowance was made for the deduction of the value of timber cut, the court had discretion to allow interest on the residue of the price of the timber land from the date when the vendors were in condition to make a good title, until paid, whether the action be deemed one on express contract for the residue of the price, under section 3287 of the Civil Code, or one on an implied contract, upon *quantum meruit*, under section 1917 of the same code. (McCowen v. Pew, 482.)
20. **EQUITABLE CIRCUMSTANCES IN FAVOR OF INTEREST—REJECTION OF REASONABLE OFFER—UNREASONABLE DEMAND—EXPENSIVE LITIGATION.**—Where there was a dispute as to value of the timber cut, and pending negotiations between the parties, the vendors finally offered a deduction of \$600, which offer was refused, and the court on the basis of the acreage cut at the agreed price per acre allowed only \$410 therefor, and the unreasonable deduction of over \$4,000 was demanded by plaintiff, and such unreasonable demand led to a long and expensive litigation, the case is clearly one for the application of the equitable principle of interest for long delay in breach of the obligation to pay the residue of the agreed price. (Id.)
21. **STATUTORY INTEREST ALLOWABLE—AMOUNT “CAPABLE OF CERTAINTY BY CALCULATION.”**—It is held that, aside from the strictly equitable view as to interest, the facts of the case justify the application of section 3287 of the Civil Code, which allows interest not only when the damages are certain, but also when they are “capable of being made certain by calculation.” Since appellant knew the number of acres from which the timber had been removed, and the whole land was principally valuable for its timber, and the agreed price therefor was fifteen dollars per acre, it would seem to be a mere “matter of calculation” to determine what allowance should be made for said removal. (Id.)

SPECIFIC PERFORMANCE (Continued).

- 22. EXISTENCE OF UNLIQUIDATED SETOFF OR COUNTERCLAIM TO LIQUIDATE DEMAND—INTEREST ON BALANCE ALLOWED.**—Where the amount of a demand is sufficiently certain to justify the allowance of interest thereon, the existence of a setoff or counterclaim, which is itself unliquidated, will not prevent the recovery of interest on the balance of the demand from the time it became due. (Id.)
- 23. CONTRACT CALLING FOR SUFFICIENT TITLE—CERTIFICATE SHOWING ENCUMBRANCE—ACTION NOT SUSTAINABLE.**—A contract for the sale of land cannot be specifically enforced against the vendee where it provides that the seller upon payment “agrees to deliver a certificate of title showing the title to be vested in the seller and to execute and deliver to the buyer, or her assigns a good and sufficient deed of bargain and sale,” if the certificate of title tendered showed an encumbrance existing against the land by deed of grant of the right of a third party to lay and maintain water-pipes through the land. The words “title vested in the seller” import necessarily a good title, which is free from encumbrance. (*Hixson v. Hovey*, 230.)
- 24. IMPLIED CONDITION IN EXECUTORY CONTRACT OF SALE OF LAND—BURDEN OF PROOF.**—In every executory contract to sell land there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance a title unencumbered and without defect; and the vendor is bound to satisfy that implied condition and make proof of an unencumbered title without defect, before he can be entitled to a decree for specific performance of the contract. (Id.)
- 25. PURCHASER NOT ESTOPPED BY FAILURE SPECIFICALLY TO OBJECT TO TITLE TENDERED BEFORE SUIT.**—Where the vendor in his complaint alleged that he had performed all of the terms and conditions of his contract, and was still ready and willing to perform the same, and his proof failed to sustain his right to recovery, he cannot complain that the failure to sustain the burden of proof resting upon him was aided by an estoppel of the purchaser by failure to object specifically to the defect in the title, at the time of the tender of the certificate of title and deed before suit. Such failure cannot affect the obligation of the vendor, or permit him to enforce any different contract from that expressed in the writing. (Id.)
- 26. CONSTRUCTION OF CODE AS TO WAIVER OF SUFFICIENCY OF TENDER—QUESTION OF COSTS AND RIGHT TO SUE.**—The provisions of section 2076 of the Code of Civil Procedure, touching a waiver by failing to object to the form of a tender, are mere rules of evidence affecting the question of costs and the right to sue where a tender is necessary before suit. It cannot help a suit in which no sufficient performance or offer to perform is shown by the plaintiff, and no cause of action for specific performance is proved. (Id.)

See Vendor and Vendee, 23-28.

STATE LANDS.

1. **STATE SCHOOL LANDS—LIMITATION OF TIME FOR CONTEST—FIVE YEARS FROM ISSUANCE OF CERTIFICATE.**—Under the provisions of section 3499 of the Political Code, as amended March 13, 1911, the superior court is divested of jurisdiction to hear and determine a contest for state lands, unless such contest shall be filed, heard, determined, referred or allowed, within five years from and after the date on which such certificate of purchase may have been issued. (*Craycroft v. Superior Court*, 781.)
2. **CODE AMENDMENT RETROACTIVE.**—The provisions of section 3499 of Political Code as amended in 1911 are expressly made applicable to all cases; and there is a clearly expressed intention that that section should act retroactively, and bar all previously issued certificates unless heard and determined within five years from the date of the issuance of the certificate. The mere application to purchase, without payment of money, vests no rights in the applicant, and that section cannot be said to impair the obligation of any contract, or to be destructive of any vested rights or interests. (*Id.*)
3. **WANT OF JURISDICTION OF SUPERIOR COURT—PROHIBITION—REMEDY BY APPEAL—ADEQUACY—DISCRETION OF PROHIBITING COURT.**—Since the superior court is divested of jurisdiction to hear and determine a contest of a certificate of purchase after the lapse of five years from its date, a writ of prohibition will lie to restrain it from exercising such jurisdiction, notwithstanding a possible remedy by appeal from its judgment without jurisdiction. The question whether such remedy is adequate is matter within the sound discretion of the court granting the writ. (*Id.*)

STATUTE OF FRAUDS. See *Brokers*, 10-12; *Homestead*, 6.

STATUTE OF LIMITATIONS. See *Account*, 3; *Estates of Deceased Persons*, 3; *Vendor and Vendee*, 23-26.

STATUTES. See *Criminal Law*, 13, 14.

STOCK AND STOCKHOLDERS. See *Corporation*; *Criminal Law*, 12-21.

STREET ASSESSMENT.

1. **WIDENING OF STREET—VALIDITY OF ASSESSMENT—POSTING NOTICES—CONFLICTING EVIDENCE—DETERMINATION BY TRIAL COURT CONCLUSIVE.**—In an action to annul an assessment for the widening of a street under the street opening act of 1903, in which the evidence was conflicting as to whether or not the required notices of the passage of the ordinance of intention to widen the street had been conspicuously posted upon all of the streets included within the assess-

STREET ASSESSMENT (Continued).

ment district, as required by section 8 of that act, it was for the trial court to determine the weight to be given to the evidence on that question, and its determination against the plaintiff and in favor of the defendants must be deemed conclusive upon appeal. (*Bernard Co. v. The City of Los Angeles*, 626.)

2. **RECORD OF ASSESSMENTS AND DIAGRAMS—SLIGHT UNCERTAINTY IN ONE PARCEL NOT INVOLVED—ENTIRE ASSESSMENT NOT VITIATED.**—A slight uncertainty in the record of one parcel of property included within the assessment district, of which the owner does not complain, and whose assessment may have been paid, cannot vitiate the entire assessment of property in the district, nor affect the validity of the record of the assessment of the property of the plaintiff, who is in no position to complain of an alleged erroneous record of an assessment in which he is not interested. (*Id.*)
3. **MODE OF RECORD OF DIAGRAM—PASTING UPON STUBS IN RECORD BOOK OF ASSESSMENT—PURPOSE TO CREATE LIEN—DETACHMENT AND REPASTING IMMATERIAL.**—Where the act prescribes no mode in which the diagram shall be recorded, and the purpose of the record is not to give notice of the lien created, but merely to cause it immediately to attach upon the property, the pasting of the diagram upon a stub in the record book in which the original assessment is recorded is a substantial compliance with the provision of section 20 of the act requiring the assessment and diagram to be recorded. The fact that, by handling, such diagram may be detached from the stub, and another pasting is made thereon before trial is not important, as respects the lien created. (*Id.*)
4. **MEANING OF WORD "RECORDED"—ABSENCE OF STATUTORY DIRECTION—NATURE OF PURPOSE AS PERMANENT OR TEMPORARY.**—Though the word "recorded," in ordinary usage, signifies to copy or transcribe into some permanent book, yet such meaning of the word, in the absence of statutory direction, should attach only in those cases where the record is intended to perform functions through a long period of time. There is a manifest difference between a record intended to perform functions for a long period and one intended only to serve a temporary purpose of brief duration, which, after it is accomplished, ceases to be useful. (*Id.*)
5. **PURPOSE OF "RECORD" OF DIAGRAM—SUBSTANTIAL COMPLIANCE—LIBERAL CONSTRUCTION OF STATUTE.**—Since there has been a substantial compliance with the purpose of the statute in requiring a record of the diagram and with the requirement whereby every right intended to be protected thereby has been secured, and since the statute expressly declares that this act shall be liberally construed to promote the objects thereof, it is held that appellants' contention to the contrary cannot be sustained. (*Id.*)

STREET ASSESSMENT (Continued).

- 6. ACQUIREMENT OF JURISDICTION TO CONDEMN LANDS FOR WIDENING STREET—REQUISITE NOTICE—ADJOURNMENT OF HEARING.**—Where all of the proceedings requisite for the acquirement of jurisdiction to condemn lands for the widening of the street, upon the report of the referees, were taken with the notice which was required by section 11 of the act of 1903, as originally enacted, and also with the further notice required by that section as amended in 1909 after the enactment of the amendment, the court, after being thus vested with full jurisdiction, had the right to adjourn the time appointed to hear the report of the referees, without further notice than that required by section 11 as it existed when jurisdiction was acquired. (Id.)
- 7. POWER OF CITY COUNCIL TO ABANDON PROCEEDINGS—LOSS OF POWER UNDER AMENDED ACT.**—Where no power of the city council to abandon proceedings under the original section 14 of the act of 1903, at any time prior to the payment of compensation was exercised thereunder, and under the amendment of 1909 to that section its jurisdiction to abandon the proceedings was expressly limited to a time preceding the entry of the interlocutory judgment, its attempt to abandon the proceedings after such entry is held void and of no effect, under the authority of *Title Insurance & Trust Co. v. Lusk*, 15 Cal. App. 358, [115 Pac. 53], for want of power to abandon the same. (Id.)
- 8. IMPLIED ACTION UPON PROTEST—ORDER FOR NEW ASSESSMENT.**—The ineffectual attempt of the council to abandon the proceedings was effective to the implied extent of sustaining the protests. The city council had jurisdiction to hear the protests and act upon them, and either affirm, modify or correct the assessment, or to order a new assessment, as it subsequently did in the proper exercise of its power, which it had no jurisdiction to abandon or nullify after the entry of the interlocutory decree. (Id.)

See Eminent Domain.

SUICIDE. See Office and Officers, 10-12.

SUMMONS. See Corporation, 19, 20; Judgment, 11-14.

SUPERIOR COURT. See Accounting, 2-4; Estates of Deceased Persons, 13; Justice's Court, 1-5; State Lands, 3.

SURETY. See Estates of Deceased Persons, 12, 15; Justice's Court, 4, 5; Promissory Notes, 7.

TAXATION.

- 1. ACTION TO QUIET TITLE—FINDINGS—SUPPORT OF JUDGMENT—TITLE UNDER UNITED STATES PATENT—VOID TAX SALE OF PUBLIC DO-**

TAXATION (Continued).

MAIN.—In an action to quiet title by a plaintiff, alleging ownership in fee under a United States patent, in pursuance of a homestead entry made June 1, 1897, as against a defendant claiming a tax title under the state, by a sale of the public domain for taxes of the year 1895, where the findings cover all of the issues presented, it is held that the judgment for the plaintiff follows logically and necessarily from the facts found; that the tax sale of the public domain is void under the law, and that the finding as to plaintiff's ownership in fee is of an ultimate fact, sufficient to support the judgment. (*Machado v. Canty*, 35.)

2. **ABSENCE OF CONFLICT IN FINDINGS—CONSTRUCTION OF UNCERTAIN FINDINGS—PRESUMPTION AS TO ABSENT FINDING.**—It is held that there is no conflict in the findings, when taken together; and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it; and that if it were the fact that the findings do not cover all of the material issues, in the condition of the record, it would be presumed that any omission therein was without prejudice; though it is held that the findings do cover all of the essential allegations of the pleadings. (*Id.*)
3. **JUDGMENT QUIETING TITLE AGAINST VOID TAX TITLE—REFUNDING OF TAXES PAID NOT REQUIRED.**—It is held that it was not error for the trial court to render a judgment for the plaintiff quieting his title, as against the void tax title held by the defendant, without requiring the plaintiff to pay to the defendant the amount that was paid for the property at the tax sale. The state had no right to assess taxes on the land of the United States, and a tax title thereunder could convey no title to the state, and it could convey none to defendant. The taxes paid by him were voluntary and cannot be recovered; and he can claim no subsequent taxes, or lien therefor, which has not been acquired by him. (*Id.*)
4. **JUDGMENT RIGHT UPON MERITS NOT REVERSIBLE FOR IMMATERIAL NEW EVIDENCE.**—It is held that the judgment rendered by the superior court should be affirmed, and cannot be reversed and remanded for a new trial, upon a showing of evidence newly discovered pending the appeal which is stated to be upon information of a witness not produced, and shows that the evidence stated would be immaterial, upon a new trial, as it merely states that in 1895, when the public domain was assessed, a homestead claimant was then in possession, which shows a title then in the United States, which was not subject to taxation by the state. The law in force at the time of the assessment must govern. (*Id.*)

TITLE TO LAND.

1. **ACTION TO QUIET TITLE UNDER McENERNEY ACT—MOTION TO VACATE JUDGMENT BY DEFAULT UNDER SECTION 473—ADVERSE CLAIMANT**

TITLE TO LAND (Continued).

NOT SERVED—TITLE NOT DERAIGNED.—Where a motion to vacate a judgment by default rendered under the McEnerney act of 1906 (Stats. 1906, p. 78), quieting title to four lots, is based upon an affidavit otherwise sufficient under section 473 of the Code of Civil Procedure, to entitle the mover to the relief asked on the ground that the plaintiff knew when the action was commenced that a defendant, now deceased and represented by an administratrix, was a half owner of three of said lots and the whole owner of lot 4 thereof, it is not a ground of objection to such affidavit, as distinguished from a proposed answer, that it does not state the source of the claimant's title. (Davidson v. All Persons, etc., 723.)

2. **EFFECT OF LIS PENDENS UNDER McENERNEY ACT—SHOWING REQUIRED TO VACATE DECREE—ADVERSE INTEREST AT COMMENCEMENT OF ACTION.**—The notice of *lis pendens* required to be filed under the McEnerney act must be deemed to apply to all defendants named or not named. It follows that a defendant not named therein seeking relief from the judgment under section 473 of the Code of Civil Procedure must show that he had some interest in the property involved in the action at the time of the commencement of the action adverse to that asserted by the plaintiff. (Id.)
3. **SUFFICIENT SHOWING OF "VALID ADVERSE INTEREST"—"OWNERSHIP."**—Under section 473 of the Code of Civil Procedure, it is sufficient that the affidavit shall state facts sufficient to show that the claimant had a "valid adverse interest" in the property involved in the action when it was begun. An allegation of "adverse interest" must necessarily result from an allegation of "ownership" known to exist by the plaintiff when the action was commenced. (Id.)
4. **FALSE AFFIDAVIT OF PLAINTIFF—FINDINGS AND DECREE NOT CONCLUSIVE.**—Section 5 of the act expressly requires the plaintiff to make affidavit "that he does not know and has never been informed of any other person who claims or may claim any interest in . . . the property adversely to him," and if he discloses the name of such person, the summons shall be personally served upon such person, if he can be found in the state, with a copy of the complaint and affidavit. The findings and decree should not be held to be conclusive of the truth of such affidavit if shown to be false and fraudulent, as against a party not served with summons who asks relief under section 473, and directly and unequivocally states that plaintiff knew at the commencement of the action, and when he took his decree, that the claimant had an interest in the property. (Id.)
5. **STIPULATED ANSWER PROPOSED TO BE FILED AT TIME OF MOTION.**—Where the parties have stipulated that a verified answer set forth was proposed to be filed at the time of the motion, which distinctly presents issues of fact as to the ownership of the property, setting forth the nature and source of the title claimed to have been in

TITLE TO LAND (Continued).

appellant's intestate prior to the commencement of the action, while it is not made part of the record of the motion, the trial court, since it was proposed to be filed, might well have considered it under the circumstances, and should have given it its proper weight in determining the motion. (Id.)

6. **RELIEF TO BE GRANTED TO LEGAL REPRESENTATIVE OF DECEASED DEFENDANT.**—Section 473 of the Code of Civil Procedure expressly extends to the legal representative of a deceased defendant the right "to answer to the merits of the action," and a similar right of substitution is involved in section 1582 of the same code. (Id.)

See Specific Performance, 23-25; Vendor and Vendee.

TRESPASS. See Landlord and Tenant, 3, 4.

TRUST. See Estoppel.

UNDUE INFLUENCE.

1. **ACTION TO SET ASIDE DEED FROM AGED MOTHER TO SON—ABSENCE OF INDEPENDENT ADVICE—INCAPABILITY OF UNDERSTANDING—SUPPORT OF FINDINGS.**—It is held, upon a review of the evidence in this action to set aside a deed from an aged mother to her son, on the ground of undue influence, that the findings that the deed was obtained by undue influence, and was not voluntarily delivered, and that by reason of her old age and mental weakness she was incapable of transacting or understanding business transactions in a thoroughly intelligent manner, and was particularly incapable of properly understanding the nature, effects and consequences of any act regarding the transfer of real property, without independent advice and careful explanation thereof, and that she had no independent advice, were properly sustained by the evidence. (Piercy v. Piercy, 751.)
2. **CONFIDENTIAL RELATION BETWEEN SON AND MOTHER—INFERENCE OF UNDUE INFLUENCE—SUPPORT OF JUDGMENT SETTING ASIDE DEED WITHOUT CONTRARY SHOWING.**—Where the son lived with his mother, hired her servants, and had been for a long time the manager of her property, and for years her agent holding her general power of attorney, it is held that the confidential relation so existing between them would warrant the inference of undue influence on the part of the son in obtaining a deed of real property from his mother, which would constitute sufficient support for the judgment of the superior court in setting the deed aside, without a clear showing which would rebut such inference. In the absence of such clear and convincing proof, the conveyance is presumed to have been obtained by undue influence and to be void. (Id.)

UNDUE INFLUENCE (Continued).

- 3. INDEPENDENT ADVICE—BURDEN OF PROOF TO REBUT INFERENCE.—**
Persons standing in a confidential relation toward others cannot entitle themselves to hold benefits conferred upon them unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them, which had been given in private by some one of the grantor's own selection, when the grantor was not surrounded with dominating influences favoring the transfer; or, at least, must assume the burden of showing to the entire satisfaction of the court that the gift was made freely and voluntarily, with full knowledge of the facts, and with entire understanding of the effect of the transfer. (Id.)
- 4. PRESUMPTION OF UNDUE INFLUENCE NOT OVERCOME—PRESUMPTION CONFIRMED BY POSITIVE EVIDENCE OF DOMINATION.—**It is held, in view of all the evidence, impossible to rule that the court should have been convinced, or that it should have determined, that the presumption of undue influence was overcome, and that the asserted conveyance should be held valid, but, on the contrary, there is strong proof, actual and circumstantial, to show the dominating influence of the defendant over his mother. (Id.)
- 5. SUPPORT OF FINDING AS TO NONDELIVERY OF DEED—SUBSEQUENT RECORD NOT PROOF—QUESTION OF FACT—INTENTION OF GRANTOR.—**It is held that the finding that there was no intentional or actual delivery of the deed by the purported grantor is sufficiently supported by the evidence. The subsequent recording of the deed by the purported grantee is not a delivery, unless it comes from the hand of the grantor, or someone claiming through or under the grantor. The delivery of the deed is a question of fact, depending upon the intention of the grantor as to passing title. But the court might rationally conclude from the evidence that the grantor neither said nor did anything to indicate an intention to deliver the deed, or to pass the title. (Id.)
- 6. EVIDENCE—TESTIMONY OF ATTORNEY AS TO CONVERSATION BETWEEN ATTORNEY AND BOTH PARTIES—RELATION OF ATTORNEY TO PARTIES IMMATERIAL.—**The testimony of the attorney who drew the deed was admissible to prove a conversation participated in between himself, the grantor and the grantee, regardless of whether he was the attorney solely of the grantor, or of the grantee, or of both parties. In either case, the other party may require him to testify to such conversation. (Id.)
- 7. EVIDENCE OF FRAUD—DELAY AND ATTEMPTED SECRECY IN RECORD OF DEED.—**The conduct of the defendant in long delay and in attempted secrecy of the record of the deed was admissible as tending, if unexplained, to show a consciousness of fraud in the obtain-

UNDUE INFLUENCE (Continued).

ing of the deed, and to indicate a purpose to avert any suit to set aside the deed until after the death of the grantor. (Id.)

8. **AFFIDAVIT OF GRANTOR AGAINST SUIT TO SET ASIDE DEED—REBUTAL—PROOF BY ADMINISTRATOR OF CONTRARY DECLARATIONS.**—Where the grantor was induced by the son to make an affidavit that her suit to set aside her deed to the son was unauthorized, and that she did not employ the attorney who brought it, and that she did not fully understand the nature of the proceedings, it was proper for her administrator, who carried on the suit after her death, to rebut such affidavit by proof of her contrary declarations that she did understand the situation and that her purpose was as indicated by the complaint filed. Such declarations are within the rule declared in section 1850 of the Code of Civil Procedure, and the principle that words so connected with and illustrative of an act as to elucidate and define its character are considered as appertaining thereto, and admissible to clarify the same. (Id.)

9. **GENERAL RULE AS TO EVIDENCE OF DECLARATIONS BEFORE AND AFTER DEED—STATE OF MIND—QUESTION OF REMOTENESS.**—It is a familiar rule of evidence that when a grantor's mental condition on the date of a deed is in issue, a showing may be made of his mental condition both before and after its date, as indicative of the probable mental condition of the grantor at the date in question. It is only necessary that the matters testified to be sufficiently near in point of time in order that the testimony may be of value in determining the question directly in issue. The question of remoteness is one for the court to determine, and the weight of the testimony is to be governed according to the facts. The state of mind at one time is competent evidence of its state at other times, not too remote, because mental conditions have some degree of permanency. (Id.)

VENDOR AND VENDEE.

1. **CONTRACT TO SELL LAND—DESCRIPTION—IDENTITY—WARRANTY OF DISTANCE BETWEEN BOUNDARIES—QUANTITY OF LAND.**—Where a contract to sell land correctly describes its boundaries, a warranty of the distance between two designated boundaries does not vary or change the identity of the description of the land agreed to be sold. It is only a warranty as to the quantity of the land contained within the description. (Fox v. Robinson, 585.)
2. **RESCISSION OF EXECUTORY CONTRACT BY VENDEE—FRAUD—BREACH OF WARRANTY—PLEADING.**—A vendee may be entitled to rescind an executory contract for the purchase of land, and to a return of the money paid thereon, when such contract was procured by false and fraudulent representations as to the quantity of the land contained within the parcel described, and also when there

VENDOR AND VENDEE (Continued).

has been a breach of warranty as to such quantity. But, in such case, the fraudulent representations or the warranty and breach thereof as to quantity must be pleaded. (Id.)

3. **COMPLAINT FOR RESCISSION OF CONTRACT BASED ON FAILURE OF TITLE—CLEAR TITLE—VARIANCE—BREACH OF WARRANTY—PROPER JUDGMENT OF NONSUIT.**—Where the complaint for rescission of the contract of sale and to recover the purchase money paid thereon correctly describes the land set forth in the contract, and is solely based upon the alleged failure of a clear title thereto in the defendant, but the record shows that the defendant had a clear title to the land described, and shows only a breach of warranty as to the quantity of the land described, as a ground for rescission, it presents a clear case of variance between the complaint and proof, and the court properly granted a judgment of nonsuit. (Id.)
4. **AVERMENT OF TENDER AND DEMAND FOR DEED—EVIDENCE—NON-COMPLIANCE WITH LAW—BAD FAITH.**—Though the complaint for rescission alleged that plaintiff tendered the balance of the purchase money, and demanded a good and sufficient deed from defendant within ten days, yet where the evidence shows a noncompliance with section 1489 of the Civil Code as to tenders and offers of performance, but merely shows that, without any attempt to find the defendant personally, it was made at his residence during his absence, and also shows that the tender and demand were made in bad faith, with intent to reject any deed complying with the contract, and not conforming to the warranty, and that he subsequently rejected an offer of defendant to reduce the price because of deficiency in quantity, the judgment rendered was clearly warranted. (Id.)
5. **CONTRACT TO SELL LAND—MUTUAL AND DEPENDENT COVENANTS—OBJECTIONS TO TITLE—RECOVERY OF DEPOSIT—FULL TENDER OF PERFORMANCE ESSENTIAL—GOOD TITLE TENDERED.**—Where, under a contract for the sale and purchase of land, the covenants of the contracting parties were mutual and dependent, and each party was bound to a full performance of the contract at the same time, and ten per cent of the cash price of \$13,500 was deposited to secure the sale, and the remainder of \$6,000 cash was to be paid, and \$7,500 secured upon the making of a good title, and if a good title could not be made, the deposit was to be returned, or forfeited, if the vendor was ready to perform, and the purchaser refused to perform, and the purchaser objected to defects in the title, which were met within the life of the contract, by the tender of a good title, the purchaser cannot sue to recover the deposit without tendering full performance on his part, and he is bound to accept the good title offered, and to pay for and secure payment as agreed. (Griesamer v. Hammond, 535.)

VENDOR AND VENDEE (Continued).

- 6. GENERAL RULE AS BETWEEN VENDOR AND PURCHASER—OUTSTANDING DEED OF TRUST—RECONVEYANCE FROM TRUSTEES.**—The general rule, as between vendor and purchaser, is that the purchaser cannot sue to recover purchase money paid until after he has made a tender of the purchase money due under the contract and demanded a deed. The fact that, in the present case, there was a deed of trust outstanding did not excuse plaintiff from the necessity of making a tender of the purchase money in order to recover his deposit, especially where the vendor was in readiness to remedy the defect by a reconveyance from the trustees to the purchaser. The vendor had the right to rely upon the purchase money to liquidate the debt secured by the deed of trust. (Id.)
- 7. NATURE OF DEED OF TRUST TO SECURE DEBT—MORTGAGE.**—A deed of trust given as security for the repayment of money is, under the circumstances of this case, regarded as a mortgage. Under the facts, there was no unremovable defect in the title to the property involved in the controversy, and it is sufficient that the vendor through one of his agents tendered to the plaintiff a perfect title to the property. (Id.)
- 8. DUTY OF VENDEE TO INQUIRE AS TO TAXES PAID OR EXISTENCE OF ANY ENCUMBRANCE.**—Where the taxes were in fact paid, although the vendee was not informed thereof, it was his duty to inquire as to the condition of the record, and as to whether there were any unpaid taxes or other encumbrance. (Id.)
- 9. RECORDER'S FEE FOR RECONVEYANCE NOT TENDERED—WAIVER OF OBJECTION.**—The fact that the recorder's fee for recording the reconveyance was not tendered does not affect the validity of the tender of the reconveyance, especially where if it had been demanded it would doubtless have been paid, and, under the circumstances, such objection was waived by the failure of the plaintiff to object to the reconveyance by the trustees on that ground. (Id.)
- 10. FINDINGS FOR PLAINTIFF UNSUSTAINED.**—It is held that the findings for the plaintiff are unsustained by the evidence. (Id.)
- 11. CONTRACT TO SELL LAND—IMPROVEMENTS BY PURCHASERS—RECONVEYANCE AFTER DEFAULT—FORECLOSURE OF DEEDS OF TRUST—CONSIDERATION FOR ASSUMPTION OF DEBTS.**—Where, under a contract by the defendant to sell land, the purchasers in possession subdivided it into lots and improved the same at large expense, and incurred large indebtedness, and after default in the payment of purchase money to defendant, the property was reconveyed to defendant under an agreement that defendant should assume and "pay to Martin and Hall \$8,200 for street improvements," which in fact included other improvements aggregating that sum, besides "\$8,700 for mortgage indebtedness," which was in fact for deeds of trust foreclosed in that sum, it is held that the equity of redemption acquired by the

VENDOR AND VENDEE (Continued).

reconveyance was a sufficient consideration for the agreement to assume the whole amount of such debts. (Hall-Martin Company v. Hughes, 513.)

12. **CONSTRUCTION OF AGREEMENT TO PAY SUM FOR STREET IMPROVEMENTS—PAROL EVIDENCE TO EXPLAIN INTENTION INADMISSIBLE.**—It is held that in the construction of the agreement to pay the sum of "\$8,200, street improvements," the amount specified is the controlling factor, and not the specification of the matter to which the payment should be applied; and that the defendant was obligated by his agreement to pay that full sum. And since the contract is susceptible of construction on its face, parol evidence was not admissible to explain the intention of the parties to the contract. (Id.)
13. **CONTRACT MADE FOR BENEFIT OF THIRD PARTY—RIGHT OF ENFORCEMENT.**—Under section 1559 of the Civil Code, "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." While such contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to such third party. (Id.)
14. **ESTOPPEL OF DEFENDANT—ACQUIESCENCE IN RIGHT OF PURCHASERS TO CONTRACT FOR TOTAL DEBT AS UPON A SINGLE ITEM.**—It was the right of the purchasers, if conscious of an indebtedness to plaintiff approximating \$8,200, to contract with the defendant that he should pay, as for any single item, an amount sufficient to cover all their obligations to plaintiff, and defendant having acquiesced in this, and agreed to pay such gross sum, and having accepted the conveyance and retained its benefits, should not be heard now to say that the item specified was less than the aggregate amount agreed to be paid as part of the purchase money, such aggregate amount representing the *bona fide* indebtedness of his grantors to plaintiff at the time. (Id.)
15. **DIVISION OF ITEMS OF CREDIT IN TWO SUITS.**—The fact that different items of the indebtedness, which might have been recovered by the plaintiff in one suit, were divided and set forth in two suits, such election not having been objected to, and the judgments rendered in the two actions being correct in amount, and within the limits of the liability of defendant to plaintiff, after having paid part thereof, the judgments will not be disturbed. (Id.)
16. **CONTRACT TO SELL IN SAN FRANCISCO—DEPOSIT—DESTRUCTION OF RECORDS IN TWO DAYS—UNMERCHANTABLE TITLE—ACTION FOR MONEY HAD AND RECEIVED.**—Where a contract to sell and purchase land in San Francisco was made April 16, 1906, and \$500 was paid on account of the price under an agreement allowing the purchaser twenty days to examine the title, and if found defective, the seller

VENDOR AND VENDEE (Continued).

was to be allowed thirty days in which to perfect the title, in default of which the deposit was to be returned, and by the destruction of the records of San Francisco by fire April 18, 1906, a merchantable title under the terms of the contract was rendered impossible, the purchaser had the right to disaffirm it and recover the deposit in an action for money had and received. (*McDermott v. Catfield*, 499.)

17. **NOTICE OF DEFECTIVE TITLE UNDER THE CONTRACT NOT REQUIRED—DEFECTIVE NOTICE IMMATERIAL.**—Upon the destruction of the records before anything was done under the contract beyond the payment of the money, no notice of defective title mentioned in the contract to be given by the purchaser within twenty days was necessary, as it would have been an idle and useless act, which the law never requires; and it cannot be held, under the circumstances of the case, that a defective notice would disentitle the purchaser to the return of his deposit. (*Id.*)
18. **ABANDONMENT OR MUTUAL RESCISSION OF CONTRACT NOT REQUIRED TO MAINTAIN ACTION BY PURCHASER.**—The evidence in the case was not required to show an abandonment or mutual rescission of the contract by both parties, in order that the purchaser may maintain an action of money had and received to recover the deposit. It is sufficient to sustain the action that the evidence shows that the title was essentially defective, and that it was impossible for the vendor to remedy the defect and convey a perfect title. (*Id.*)
19. **CONTRACT TO PURCHASE LAND—POSSESSION—TIME OF ESSENCE—FORFEITURE—TENANCY AT WILL—NOTICE—RECOVERY OF POSSESSION—DENIAL OF TITLE OR TENANCY—TRESPASSER.**—Where by the terms of a contract to purchase land, under which the purchaser received possession, time was made of the essence of the contract, and it was to be forfeited for nonpayment, and the purchaser was to hold as tenant of the vendor, the purchaser, in such case, becomes a tenant at will of the vendor, who is entitled to thirty days' notice to quit, if he stands upon his contract rights, before he would be subject to an action of unlawful detainer or ejectment; but where, in either of such actions, he claims equitable ownership under the contract and denies the title of the vendor, or of plaintiff, and denies his own tenancy, the plaintiff may treat him as a trespasser who is not entitled to notice, and may recover the possession. (*Abbott v. Kellogg*, 429.)
20. **EJECTMENT—APPEARANCE—WAIVER OF OBJECTION TO SUMMONS.**—If the action to recover the possession of the premises be treated as one of ejectment in which the defendant appeared, demurred and answered, without any question as to the time required in the summons so to do, he is not in a position in which he can question the sufficiency of the summons under such circumstances. (*Id.*)

VENDOR AND VENDEE (Continued).

- 21. LIABILITY FOR USE AND OCCUPATION—AMOUNT PRESUMED CORRECT.**
While defendant's entry into possession was lawful, and without liability for rent, as such, under the contract, yet, when the circumstances of the case are such that an action of ejectment will lie, the value of the use and occupation of the premises for the period of possession after the forfeiture was recoverable as damages; and the amount found by the court under the issues presented by the pleadings will be presumed correct, where nothing appears to the contrary. (Id.)
- 22. FORFEITURE OF CONTRACT RIGHTS—LAW OF CASE.**—It is held that in view of the decision of the supreme court upon a former appeal, as to all matters involved in the forfeiture of the conditions of the contract upon the part of the defendant, the rulings of the trial court in accordance therewith will not be reviewed upon this appeal. (Id.)
- 23. SPECIFIC PERFORMANCE—CONTRACT FOR LAND WITH VENDOR'S AGENT—ABSTRACT—ABSENCE OF EXPRESS PROMISE—INACTION FOR SIX YEARS—CAUSE OF ACTION NOT STATED.**—Where a contract to purchase land was made with a corporation, which was the vendor's agent, which referred to an abstract, with right to search title after its delivery, but contained no express promise to furnish an abstract, after an inaction of six years, during which no abstract was demanded, and during which the vendor had no knowledge of the existence of the contract, the rights of the purchaser must be determined by the contract with the agent, and a complaint for specific performance against the original vendor, after such inaction, which does not allege that the contract of purchase was intended to include a contract with the agent to furnish an abstract, states no cause of action. (Hopkins v. Lewis, 107.)
- 24. RETURN OF DEPOSIT NOT NEGATIVED—FAIR INFERENCE FROM FACTS—CONCLUSION NOT TO PURCHASE.**—Where the contract provided for a release of the contract and a return of the deposit if title was not shown by an abstract and was not made good, and the complaint does not allege what became of the deposit, and if the agent did its duty, the deposit was long ago returned and the transaction ended; and in view of all the facts appearing, it seems a fair inference therefrom that the plaintiff made up her mind not to purchase the property, or she would not have waited six years for an abstract without any demand therefor. (Id.)
- 25. EFFECT OF IMPLIED OBLIGATION TO FURNISH ABSTRACT—REASONABLE TIME—RIGHT TO WITHDRAW—RUNNING OF STATUTE.**—If it may be said that there was an implied obligation on the part of the vendor defendant to furnish the abstract, there being no time stated in which to perform this duty, the law would have given

VENDOR AND VENDEE (Continued).

the defendant but a reasonable time therefor, and at its expiration the plaintiff would have the right to withdraw from the contract, and the statute of limitations would also, at the same time, begin to run against the enforcement of the contract. (Id.)

26. **BAR OF STATUTE—ACQUIESCENCE IN DEFAULT OF DEFENDANT.**—In view of such implied obligation, the action would be barred by limitation. The plaintiff could not keep silent for six years, asserting no right whatever, making no demand for an abstract, expressing no willingness to complete the purchase, and doing no act in furtherance of her original purpose, without giving rise to the presumption that she had acquiesced in defendant's default, and justifying defendant in so treating her contract. (Id.)

27. **GENERAL RULE AS TO ACQUIESCENCE IN BREACH OF CONTRACT OF PURCHASE—PRESUMPTION OF ABANDONMENT OF SPECIFIC PERFORMANCE.**—Notwithstanding defendant's violation or express repudiation of his contract to sell land to the plaintiff, where the plaintiff delays to proceed for such length of time as to constitute acquiescence in defendant's breach, or a presumption of abandonment of his right to a specific performance, relief in equity for its enforcement will be denied. (Id.)

28. **LACHES—GENERAL DEMURRER.**—The question of the plaintiff's laches may be raised by general demurrer to the complaint in equity, without specifying therein the laches of the plaintiff. It may be raised on the ground that the complaint does not show any ground for relief in equity, or, under the statute, does not state facts sufficient to constitute a cause of action. (Id.)

See Brokers; Specific Performance.

VENUE. See Place of Trial.**WATER AND WATER RIGHTS.**

1. **WATER RIGHTS—CONVEYANCE OF CANAL—RESERVATION OF EASEMENT—PROPORTION OF EXPENSE—INCREASE BY MODE OF DIVERSION.**—

Where a deed of a canal by the defendant to plaintiff's grantor reserved a perpetual easement to carry through the same three hundred and fifty inches of water for delivery to defendant's customers, at any point to be selected, subject to a proportionate share of the expense of maintaining the canal, and where, instead of one point of delivery, the defendant was allowed to select and maintain twenty-eight gates for the convenience of its customers, the plaintiff was thereby required to incur the expense of assistants to superintend the proper delivery of the water through all of such gates, and all expenses incident to such increased care and maintenance of the delivery of defendant's water is justly chargeable to defendant's proportionate

WATER AND WATER RIGHTS (Continued).

share of the whole expense of maintaining the canal. (*Rogers v. West Riverside 350-Inch Water Co.*, 707.)

2. **PROPER ASCERTAINMENT OF PROPORTIONATE SHARE OF EXPENSE—END OF IRRIGATING SEASON—CONSTRUCTION OF CONTRACT.**—The court properly ascertained the proportionate share of expense chargeable to the defendant at the end of each irrigating season. The words "from time to time," as used in the contract, were intended by the parties to apply to and mean successive irrigating seasons. The expense chargeable is not ascertainable or payable until the season is closed. It is ascertained by taking the entire expense of maintaining and repairing the canal during the whole season, as the common denominator, for ascertaining the proportionate share of expense chargeable to each during the season. Defendant's share of the expense of maintenance is such proportion thereof as three hundred and fifty inches of water bears to the whole number of inches passed through the canal during the season. (*Id.*)
3. **BREAK CAUSED BY TURNING IN TOO MUCH WATER—INJUNCTION—OBLIGATION TO REPAIR—FUTURE RECOVERY OF PROPER PROPORTION—MODIFICATION OF IMPROPER ALLOWANCE.**—Where the uncontradicted evidence shows that a break in the canal in the early part of an irrigating season was caused by the plaintiff knowingly turning in too much water for its weight, though he was enjoined from diverting the same, the expense of repairing such break must fall upon him in the first instance, relying solely thereafter upon his right of recovery for the proper proportion due from the defendant; and the court erred in prematurely charging the defendant with a share of such expense, and its judgment must be modified by deducting such improper allowance. (*Id.*)
4. **MANDAMUS—COMPELLING DELIVERY OF WATER SOLD—WRITTEN PROVISION CONTROLLING PRINTED PART.**—It is held that the plaintiff is entitled to a writ of mandate to compel the delivery of water sold, under a written provision in a contract with the defendant canal company, that the water should be delivered at the highest point on the north line of the section in which plaintiff's land is situated, where it appears that the defendant has a lateral branch from its main canal extending to such highest point, and that such written provision is controlling, as against a mere printed provision, that the water should be taken from its main canal some miles distant from said section. (*Bonslett v. Butte County Canal Co.*, 149.)
5. **DEMURRER TO COMPLAINT PROPERLY OVERRULED.**—A demurrer to the complaint resting on such printed provision in the contract, relied upon by defendant, was properly overruled. (*Id.*)
6. **CONSTRUCTION OF WRITTEN CLAUSE IN CONTRACT—POINT OF DELIVERY—TIME OF FIRST PAYMENT—SUCCEEDING PRINTED CLAUSE.**—

WATER AND WATER RIGHTS (Continued).

It is held that reading the entire instrument, and having in view the rules of interpretation, the written clause—"first payment to commence at such time as the water may be ready for delivery at the highest level on the north line of the northwest quarter of said section seven"—is to be interpreted as indicating the point of delivery of water, as well as the time when payment for the water was to commence; and that a printed clause immediately following, indicating a different point of delivery, must, if repugnant thereto, be disregarded. (Id.)

7. **PROPER EVIDENCE ADMITTED TO RESOLVE DOUBT.**—It is held that any doubt as to the meaning of the terms of the contract has been satisfactorily resolved by the evidence rightly admitted for that purpose. (Id.)

8. **EVIDENCE SUPPORTING FINDINGS.**—It is held that the evidence supports all of the findings made for the plaintiff and against the defendant as to the terms of the contract, as to defendant's acquiescence in and confirmation of plaintiff's construction thereof, as to defendant's ownership and control of the lateral ditch constructed by defendant to carry water to plaintiff's land, and its actual delivery through the same of all water paid for by plaintiff, and its ability to deliver all water through the same in compliance with its agreement. (Id.)

WRIT OF REVIEW. See Certiorari.

